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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 143.

THE BOARD OF TRADE OF KANSAS CITY, MO., J. F. LEAHY, R. E. SWENSON, G. A. JOHNSON ET AL., APPELLANTS,

VS.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF NORTH DAKOTA ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

APPELLANTS' BRIEF.

M. W. BORDERS,
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Counsel for Appellants.

October 25, 1941.

ERRATA.

1. Page 22 - in the third line from the bottom of the second paragraph "Kansas City" (where it first appears in said line) should be "St. Louis," so that the phrase "can transit on the 14¢ rate to *Kansas City,*" will be "can transit on the 14¢ rate to *St. Louis.*"

2. Page 52 - the first word of the sixth line should be "Commission" instead of "Court."

3. Page 66 - in the second paragraph of the quotation, the sentence beginning on line 9 which reads "the elevator storage capacity at the Missouri River" should be completed by adding the words, "cities is enormous in comparison with that found at Des Moines" and the following words: "such conditions do not obtain at Des that found at Des Moines" should be deleted.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

APPELLANTS' BRIEF.

OPINION BELOW.

The opinion of the Court below (R. 737) is reported in 36 F. Supp. 865.

JURISDICTION OF THIS COURT.

This suit was brought under the provisions of Paragraph 28 of Section 207 of the Judicial Code (U. S. C. A., Tit. 28, Sec. 41 (28)) to enjoin, set aside, annul and suspend orders of the Interstate Commerce Commission. The suit was tried before a District Court composed of the Honorable Seth Thomas, Circuit Judge, the Honorable John C. Collet, District Judge and the Honorable Merrill E. Otis, District Judge, as required by the provisions of the Judicial Code (U. S. C. A., Tit. 28, Sec. 41 (28), 43, 44, 45, 46, 47, 47a). The three Judge District court dismissed the bill of complaint. The jurisdiction of this Court upon appeal is invoked because the Statutes expressly provide for an appeal to this Court (Sec. 210 of the Judicial Code as amended by the Acts of March 3, 1911, Ch. 231, 36 Stat. 1150, and of October 22, 1913, Ch. 32, 38 Stat. 220 (U. S. C. A., Tit. 28, Secs. 47 and 47a)).

STATEMENT OF CASE.

Nature of Suit.

This is an appeal from the judgment of a Three Judge District Court dismissing the suit brought by The Board of Trade of Kansas City, Missouri, The Merchants Exchange of St. Louis, The Minneapolis Traffic Association, The Omaha Grain Exchange, The St. Joseph Grain Exchange and a number of grain and milling companies and individuals under the provisions of the Judicial Code (27 U. S. C. A., Secs. 41 (28), 43, 45, 46, 47, 48) against the United States and the Interstate Commerce Commission to enjoin, set aside, annul and suspend certain orders of the Interstate Commerce Commission.[1]

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[1]In the trial court the Board of Railroad Commissioners of the State of North Dakota, The Farmers Educational & Cooperative Union of America, North Dakota Division, The State of North Dakota, The Public Utilities Commission of the State of Idaho, Idaho State Grange, Inc., Board of Railroad Commissioners of the State of Montana, Texas Industrial Traffic League, Ft. Worth Grain & Cotton Exchange, Tex-O-Kan Flour Mills Company and The Corporation Commission of Oklahoma intervened.

The orders in question require that shippers of grain at a few so-called "Primary" markets pay substantially higher charges for the privilege of stopping grain in transit, for storing, milling or other processing, than other shippers at numerous other points are required to pay for exactly the same or similar service. The simple fact is that, as a result of the orders of the Commission, the primary markets are not permitted to transit on the same basis or at the same cost as other shipping points which are directly in competition with the primary markets. The primary markets involved in this action are Kansas City, St. Louis, Minneapolis, Omaha, St. Joseph, Atchison and Leavenworth.

The seriousness and injustice of the situation is illustrated by the following map which was introduced in evidence along with a number of other similar maps illustrating other and similar situations (R. 725).

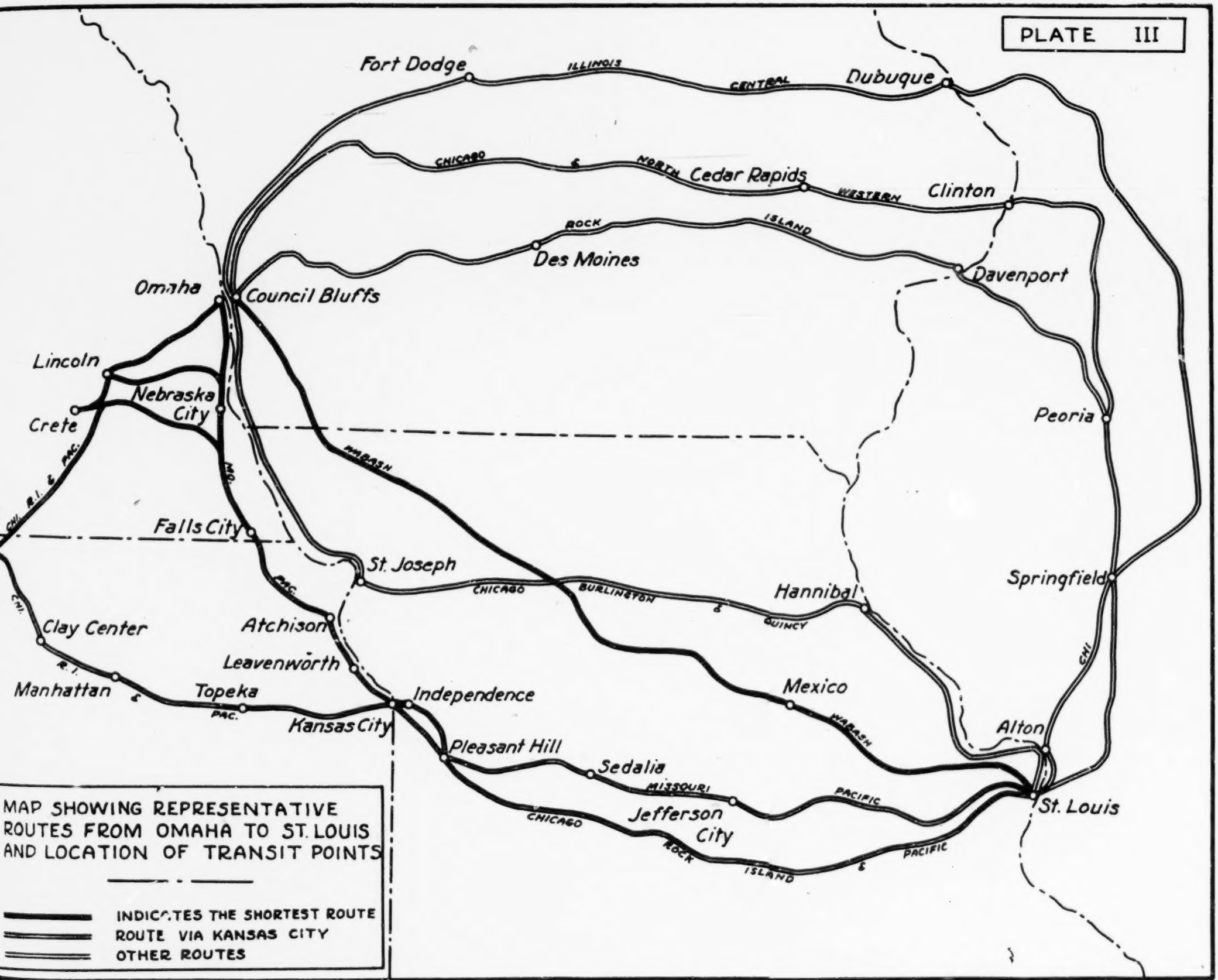
PLATE III
Fort Dodge
ILLINOIS CENTRAL
Dubuque
CHICAGO & NORTH WESTERN
Cedar Rapids
Clinton
ROCK ISLAND
Des Moines
Davenport
Omaha
Council Bluffs
Lincoln
Nebraska City
Crete
Peoria
WABASH
Falls City
St. Joseph
CHICAGO BURLINGTON & QUINCY
Hannibal
Springfield
Clay Center
Atchison
Leavenworth
Manhattan
Topeka
Kansas City
Independence
Mexico
Alton
Pleasant Hill
Sedalia
MISSOURI PACIFIC
Jefferson City
CHICAGO ROCK ISLAND & PACIFIC
St. Louis
MAP SHOWING REPRESENTATIVE ROUTES FROM OMAHA TO ST. LOUIS AND LOCATION OF TRANSIT POINTS
INDICATES THE SHORTEST ROUTE
ROUTE VIA KANSAS CITY
OTHER ROUTES

The foregoing map shows the principal routes from Omaha to St. Louis. The through rate for grain on all these routes is 14c[2] and shippers at any of the points shown may stop grain in transit for milling, storing or other transit purposes but if said grain is stopped in transit at Kansas City, Leavenworth, Atchison or St. Joseph, shippers at such points are required to pay a rate of 18 1/2c or 4 1/2c higher than their competitors at any of the other points, who pay 14c.

The Missouri-Pacific route through Atchison, Leavenworth and Kansas City is only a little longer than the most direct route, that of the Wabash, and there are numerous other routes which are much longer than that through Kansas City. Not only may all points on the Missouri Pacific route on both sides of Kansas City, Atchison and Leavenworth transit on the 14c rate, while Kansas City, Atchison and Leavenworth are held to the 18 1/2 rate, but points such as Ft. Dodge, Dubuque, Cedar Rapids, Des Moines, Davenport, Topeka, Manhattan and Lincoln may transit on the 14c rate, although the routes upon which such points are located are much longer than that of the Missouri Pacific. Moreover, the transit service and the physical incidents of the transit operation at all the points mentioned are exactly the same.

It is the contention of the appellants that this situation is one which is clearly unlawful and directly forbidden by the provisions of Sections 1 (5), 2 and 3 (1) of the Interstate Commerce Act.[3]

Section 1 (5) forbids every unjust and unreasonable charge. Section 2 forbids any carrier from charging "a greater or less compensation for any service rendered" than it charges for "a like and contemporaneous service" * * * "under substantially similar circumstances and con-

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[2]All rates referred to in this brief are stated in cents per 100 pounds.

[3]Sections 1 (5), 2, 3 (1) and 15 (1) of the Interstate Commerce Act are set out in full on pages 31-32 of this brief.

ditions" and said section provides that any carrier so doing shall be deemed guilty "of unjust discrimination which is prohibited and declared to be unlawful." And Section 3 (1) provides that it shall be unlawful for any carrier "to subject any particular person * * * *transit point*, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Appellants also contend that because of the above statutes, no administrative findings, conclusions or justifications can excuse or justify such gross discrimination and that the Commission's orders which authorize and require such a situation are beyond the power of the Commission and are null and void.

It is unfortunate that this simple case of discrimination and of undue and unreasonable prejudice must necessarily come to this Court with a record consisting of 771 pages and as one phase of a comprehensive proceeding before the Commission involving many other questions, which proceeding has been before the Commission on many occasions since its first presentation in 1929. It was, however, necessary that such lengthy record be brought before the Court because the orders which result in the discrimination complained of are based upon and are the outgrowth and result of such proceedings and, since it was necessary that such record be presented to the trial court and be brought here on appeal, it is also incumbent upon appellants to set forth the historical development of this case so that this Court may understand just how the Interstate Commerce Commission ever came to authorize and provide for such a discriminatory situation. In doing so we will be as brief as possible. In this statement and in the following argument we shall point out the various reasons relied upon by the Commission in support of its conclusions and show the unsoundness of each. Nevertheless, at the outset, appellants desire to make it clear that we most earnestly contend that this is a simple case of unlawful discrimination and un-

due and unreasonable prejudice, palpably unjust and forbidden by the Interstate Commerce Act and that there is no room for administrative judgment in connection therewith. We respectfully and most earnestly request that this Court not lose sight of the simple case here involved, merely because the task of pointing out the reasoning of the Commission and its erroneous application of the law is a matter of some detail.

While the opinions upon which the questioned orders of the Commission are based are quite lengthy, as they cover many matters not relevant to the issues raised in this suit, the portions thereof directly covering the matters in controversy are relatively short. This Court will have a complete and fair picture of the case if it will read the following relatively short portions of the Commission's various opinions:

164 I. C. C., pp. 631-645 and pp. 653, 660, 661, 697, 698 (R. 39-53, 61, 68, 69, 105, 106);
173 I. C. C., pp. 513-517 (R. 236-241);
205 I. C. C., pp. 327-329, and pp. 333-343 (R. 303 305, 311-323);
215 I. C. C., pp. 85-93 (R. 532-542);

and the entire opinions in the formal complaint cases as follows:

223 I. C. C. 235 (R. 613);
229 I. C. C. 9 (R. 635); and
231 I. C. C. 793 (R. 648).

Primary and Interior Markets.

Kansas City (including Kansas City, Kansas), Omaha, St. Louis, Minneapolis, St. Joseph, Atchison and Leavenworth, wherein are located the places of business of the Appellants in this suit, are large terminal grain markets which annually receive, market and ship great quantities of grain and its products. The Appellants operate numerous large elevators at such markets for the

storage, cleaning, drying and other handling of grain and numerous plants for the conversion of grains into flour, feeds and various other products. They are in competition with each other and with persons and corporations doing a similar business at numerous so-called "interior points" in the territories adjacent to and surrounding the terminal markets.[4]

Transit.

The business of marketing grain and its products is founded upon the widespread use of the transit privilege. The term "transit" refers to the privilege of stopping a shipment of grain while in transit for the purpose of storing, milling, marketing or other handling with its subsequent reshipment after such handling, as though the shipment were a continuous movement and upon a rate applicable from point of origin to final destination. Grain is produced and marketed far in advance of its actual consumption and must be bought and held at intermediate storage points until needed. The transit privilege which has for a long time been recognized as necessary by the Interstate Commerce Commission allows grain to be bought and later sold without the imposition of price discounts for freight rate differences and permits competition upon even terms between dealers at the several intermediate handling points and with dealers at points of origin or destination.

Rate-Break Markets.

A very large part of the grain crop each year moves to and through the large primary terminal markets where the Appellants have their places of business. The rail-

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[4]It should be noted that some of the interior points, such as St. Louis, Cedar Rapids, Davenport, Dubuque, Des Moines and Lincoln, are considerably larger than some of the primary markets, such as Atchison and Leavenworth. In fact, St. Louis is larger than any of the so-called primary markets. All interior points mentioned in this brief have substantial grain and milling interests which are in competition with those at the primary markets.

roads have always competed actively for this business. While many of the carriers have lines extending through the principal markets, others have lines which have their western or eastern termini at these markets. These carriers cannot in most instances participate in carrying grain from the points of origin to destination because their lines do not extend that far. Carriers having their western termini at the markets share in the haul and the revenue therefrom to the extent that they can obtain the outbound movement from the markets after the grain has been stopped for transit purposes.

For many years grain rates via the primary markets consisted of the local rate applicable to the initial movement from point of origin to transit point and the applicable charge from the transit point to destination, known as the "transit balance," which consisted of the remainder of the through rate from the point of origin via the transit point to the destination. And for many years prior to the passing of the Hepburn Act carriers not having through lines accepted and carried grain from the primary market at the same "balances" as would be available to the through lines. In many instances the through lines carried grain for the "balances" available under the through rates of other through lines. Later proportional rates were established and such rates have been defined as parts of, or proportions, of through rates. In many instances the through rates to points beyond the terminal markets were thereafter constructed by adding to the inbound local rate a "proportional" rate and in such instances the balance of the through rate, or transit balance, was necessarily the same in amount as the proportional rate. In other instances the through rates were less than the combinations of local rates and proportionals, but in those instances shippers were allowed, by reason of the stopping in transit privilege, to reship at the transit balance and thereby obtain the application of the direct through rate.

As a result of the practice of constructing the through rates by adding the inbound locals to the outbound proportionals, rates were said to "break" on terminal markets and such markets are now referred to as "rate-break" markets. The breaking of rates at these terminal markets is directly attributable to the natural conditions existing at such markets, namely, their location with respect to grain producing areas, their situation with respect to the lines of various carriers, but especially because the existence of rail lines terminating at such points competing for the grain made some such arrangement necessary. Such breaking of rates is not the result of any order, practice or action of the Interstate Commerce Commission. The Commission has frequently recognized that the "rate-break" developed in the manner outlined above and that it is a natural development growing out of natural conditions existing at such terminal markets. Several of the Commission's decisions recognizing these facts will be discussed in the argument in this brief.

First Grain Case.

In January, 1925, Congress adopted a joint resolution known as the "Hoch-Smith Resolution" (49 U. S. C. A., Sec. 55). The cause for the adoption of this resolution was the depressed conditions in agriculture and under it the Interstate Commerce Commission was directed to make a thorough investigation of the rate structure in order to determine to what extent rates, charges and practices were unjust, unreasonable or unjustly discriminatory and to make such changes and adjustments in rates and practices as might be found necessary to correct existing defects. As a part of the Commission's task, it conducted an inquiry into the rates and practices affecting the transportation of grain and grain products. The Commission's report and order resulting from these hearings is known as the "First Grain Case" (*Grain & Grain Products*, 164 I. C. C. 619, R. 27). In this report and

order the Commission prescribed a general downward revision of grain rates. It found the existence of rates, as outlined above, referred to as the "dual system," consisting of (1) through rates based on the combinations of flat rates inbound from country points and proportional rates outbound to such gateways as Chicago and St. Louis; and (2) through or overhead rates less than the corresponding combinations was undesirable. The commission approved this system of rates, but provided that the rate-break combinations which it prescribed should be the exclusive basis of charge when transit is taken at the primary markets (164 I. C. C. 645, R. 53).

The rate combinations which were prescribed were made applicable to transit at both interior and primary markets, the primary markets paying the inbound flat rates plus outbound fixed proportionals, while the interior points were required to pay the same through rates, which, however, consisted of the inbound local rate to the transit point, plus a transit balance therefrom, which was in each case the difference between the combination and the inbound local. This is very important and a full understanding of this situation is necessary to a proper determination of the issues arising in this suit. The Court will readily see that no prejudice resulted to either primary or interior markets because of the foregoing action taken by the Commission because both shippers at primary and interior markets reached a given destination on the same through rate. The only difference between such markets was that the rates were made to "break" at the primary markets because rates had for many years broken at such markets and because, as the Commission found, the best interests of the producer, the consumer, the carrier and others are served by this practice.

However, in order to promote carrier competition the Commission also authorized a number of exceptions—rates applicable via the primary markets which were less than the prescribed combinations, but the Commission pro-

vided that while interior points could transit on these lower through rates the higher rate-break combinations should be the exclusive basis of charge at the primary markets and at interior points on routes through the primary markets (164 I. C. C. 645, R. 53).

The Commission made it perfectly clear that it was necessary that the restrictions should apply to interior points on routes through rate-break markets, as well as rate-break points, in order not to unduly discriminate against the rate-break markets.

The Commission said (173 I. C. C. 516, R. 240):

> "The restriction is laid on the intermediate points other than the market, as well as upon the market, in order not to discriminate against the market in favor of the other intermediate points. The reason for the restriction as to all intermediate points would be apparent if the combination rate over the higher route were published as an overhead rate, for then, manifestly, transit would be accorded only at the higher rate applicable over that route.
>
> "The fact that market may draw grain from a wider territory than the other intermediate points hardly affords justification for a difference in treatment."

An illustration will clarify the situation. The present proportional rate of 16c prescribed by the Commission from Kansas City to Chicago applies over numerous routes, some of which are shown on Plate I of Exhibit 9 (R. 723). Some of the routes (shown in red) pass from Kansas City through Omaha, another rate-break point, while others shown in black do not. The effect of the Commission's order was to require that Omaha and all interior points on the routes through Omaha, such as Falls City, Nebraska City, Des Moines, Davenport, Cedar Rapids and Dubuque, should pay the combination rate of 6 1/2c to Omaha and 16c thence to Chicago, or 22 1/2c, when the 16c rate also applies as a through rate from Kansas City via Omaha and the other points named to Chicago.

Interior Points on Non-Rate-Break Routes.

Although the Commission ruled that all interior points on routes through rate-break markets should transit on the same rates as the primary markets on such routes, its orders permitted other interior points not on such routes to transit on the lower through rates. Thus, in the illustration referred to above, any of the interior points lying on any of the routes between Kansas City and Chicago, except those passing through Omaha, such as Jefferson City, St. Louis, Decatur and Springfield, in Missouri and Illinois, could transit on the 16c rate, while, as already stated, the interior points on rate-break routes and the primary markets were required to pay 22 1/2c. The same situation existed in the illustrations given by the other Plates in the exhibit named (R. 723-728).

The effect of this ruling was to give competitors of the appellants, whose places of business are located on any of these other routes, a substantial advantage, as for instance, in the foregoing illustration, of 6 1/2c on grain shipped from Kansas City or points west thereof to Chicago.

Second Grain Case.

The carriers contested the validity of the rates prescribed in the First Grain Case. They filed a petition to enjoin enforcement of the order and this case was taken to the Supreme Court. This Court in *Atchison, Topeka and Santa Fe Railway Co.* v. *United States,* 284 U. S. 248, held that the order of the Commission should be vacated because the Commission denied petitions of the carriers for further hearing designed to show, by bringing the record down to date from the close of the original hearings in September, 1928, that general economic conditions had so changed as to make the Commission's order unresponsive to current conditions. As a result of the Supreme Court's decision, the Commission reopened the proceedings as to all issues, including the

effects upon various parties of the Part 7 adjustment. The decision of the Commission resulting from this hearing is known as the "Second Grain Case" (*Grain & Grain Products*, 205 I. C. C. 301, R. 268). The Commission revised the rate levels, but affirmed its original position that the combination of local and proportional rates should be the exclusive basis of charge when transit is taken at terminal markets or at interior points on routes through such markets, notwithstanding the existence of lower through rates.

Commission Reverses Previous Rulings.

On March 4, 1936, the Commission, upon further consideration of the record taken in connection with the report on further hearing, reversed its original view and held that interior points on routes passing through the primary rate-break markets should be permitted to transit on the lower through rates and would not be held to the higher rate-break combinations (*Grain & Grain Products*, 215 I. C. C. 93, R. 541). Thereby the Commission lifted the restriction from the interior points, although such points were located on the same routes and received exactly the same service as the primary markets and although it had theretofore on two separate occasions positively and emphatically held that such interior points should be subject to the same restrictions as the rate-break markets in order not to discriminate unduly against the latter.

The effect of this was, to again refer to the illustration given on Plate I of Exhibit 9 (R. 723), to permit all interior points on the routes through Omaha, such as Falls City, Nebraska City, Des Moines, Davenport, Cedar Rapids and Dubuque, to transit on the proportional rate of 16c from Kansas City to Chicago, while Omaha must still pay the combination of 22 1/2c, even though the shipments transited at the other points may move over the identical routes through Omaha. Such action greatly in-

creased and intensified the discrimination against the primary markets.

In reversing its position, the Commission stated that a modification of its previous ruling would have to rest upon "a substantial difference in conditions affecting the interior transit points and rate-break markets" (215 I. C. C. 90, R. 538). While the Commission said that there must be a substantial difference in conditions, it found no difference in transportation services and found that the mechanics of transit under the rate-break and under the through rates were exactly the same.

It sought to justify the discrimination against the primary markets because it said that under the rate-break existing at the primary markets, such markets enjoyed a benefit from the fact that outbound shipments were always on a definitely published constant factor. It was said that because of this situation shippers at the rate-break markets enjoyed a selection of out-bound carriers which did not exist at other points. 215 I. C. C. l. c. 91 (R. 538). Basing its opinion upon this alleged advantage, the Commission said that a difference in treatment between rate-break markets and interior points was justifiable.

Appellants will show in the argument that any advantages existing because of the rate-break cannot constitute a lawful basis for a difference in rates, as such advantages, if any, are due entirely to the location and facilities of such markets (which give rise to the rate-break) and the Courts and the Commission have held that they cannot be off-set or equalized. It will be shown that the Commission in authorizing different charges for transit because of these considerations has exceeded its lawful powers and has created and upheld gross discrimination and undue prejudice without any lawful basis therefor.

Now the reason for the extension of the lower through rates to all points on rate-break routes, except the primary markets was solely for the purpose of removing these in-

terior points from the discrimination which the Commission said existed against them, because they had been held to the higher combinations while other interior points on different routes enjoyed the lower rates (215 I. C. C. 89, 93, R. 536, 541).

By this extension shippers at all interior points, although such points were on the same routes as the primary markets and although they were receiving exactly the same transportation and transit service, were permitted to transit on rates substantially lower than those applicable to their immediately adjacent competitors at the primary markets. This extension was not for the purpose of contributing to the elimination of the dual system or of stabilizing the rate structure or of preserving the revenue of the carriers (matters which caused the Commission to provide that the primary markets should transit exclusively on the rate-break combinations. 164 I. C. C. 633-645, R. 41-53). The Commission was, in fact, relaxing the absolute rate-break rule, not because it found it was too strict, but simply in order to aid interior points, although to do so was to greatly increase the burden and discrimination against the primary markets, and in spite of the fact that the Commission had theretofore held on two separate occasions that it was necessary that the same restriction be applied to intermediate points on rate-break routes as was applied to the primary markets "in order not to discriminate against the market in favor of the other intermediate points" (R. 240), and even though the Commission had held that "the fact that the market may draw grain from a wider territory than the other intermediate points hardly affords justification for a difference in treatment" (173 I. C. C. 516, R. 240).

Direct and Indirect Routes.

Although the Commission has referred to the routes through rate break markets as "indirect" routes and to the other routes not through such markets as the "direct"

routes, this is most misleading and the difference in rates prescribed by the Commission is actually based upon the fact that the route passes through a rate break market, rather than upon any greater circuity in the one route over the other, or any difference in the nature or quantum of the service. As stated by the Commission in 223 I. C. C. 235, at page 241, "in some of the situations presented the shortest routes are through the rate-break points." There are various routes through the rate-break points which are much shorter than other routes not through such points. This may be illustrated by reference to the map designated Plate III (R. 725), already set out heretofore in this brief, which shows that the shortest line from Omaha to St. Louis is the Wabash Railroad, which does not pass through a rate-break point. The socalled "indirect" route through Kansas City is very little longer than the Wabash and is shorter than any of the other non-rate-break routes on which such important points as Fort Dodge, Dubuque, Des Moines, Cedar Rapids, and Davenport are located.

The distance from Omaha to St. Louis over the route of the Chicago & Northwestern Railway and the Chicago and Alton, via Cedar Rapids, Iowa, and Peoria and Springfield, Illinois, is 626 miles. The distance from Omaha to St. Louis, over the Missouri-Pacific route through Atchison, Leavenworth and Kansas City is 485 miles. Yet points like Cedar Rapids, Peoria and Springfield, located on the longer route of the Chicago & Northwestern and the Alton can transit on the 14c rate, while Atchison, Leavenworth and Kansas City, located on the much shorter route, must transit on the 18 1/2c rate. Similarly, the distance from Omaha to St. Louis, over the Chicago, Rock Island & Pacific Railway, by way of Des Moines and Davenport, is 573 miles, yet those points can transit on the lower 14c rate.

There are many other similar situations, as is apparent from the maps introduced in evidence (R. 723-728).

Discrimination Now Existing.

As the result of the Commission's orders, appellants and others doing business at the primary terminal markets have been required to pay substantially higher rates when transit is taken at such terminal markets than their competitors are required to pay when transit is taken at interior points on the same and other routes and have thereby been subjected to flagrant discrimination.

The situation created by the Commission's orders is clearly presented by the maps which were introduced in evidence (R. 723-728), one of which is set out at the beginning of this statement. Each of these maps illustrates typical rate situations and shows a number of routes and transit points located thereon. These routes are merely representative and there are numerous other situations where the same difference in transit rates exist in favor of interior points.

As shown by the maps, some of the routes pass through primary markets while others do not. In the reports of the Commission those routes passing through primary markets are called the "indirect routes" and those which do not, the "direct routes." As heretofore pointed out this is misleading because the routes through the primary markets are not always indirect routes. However, the relative distances over the different routes have nothing to do with the rates. The rates apply over all the routes and all interior points whether on direct or indirect routes, or whether or not on routes passing through rate-break markets, are permitted to transit on lower through rates.

Plates I and II (R. 723-725) show numerous routes, some of which run from Kansas City through Omaha and *vice versa*. All points on any of the routes can transit on the 16 cent rate except Kansas City, Atchison, Leavenworth, St. Joseph, and Omaha, and shippers at these markets must pay the combination of 6 1/2c (the proportional

rate between Omaha and the other markets named) and 16c, or 22 1/2c, a difference of 6 1/2c.

Among the interior points that can transit on the 16c rate from Kansas City to Chicago on routes through Omaha (Plate I) (R. 723) are Lincoln and Crete, Nebraska, although this involves a substantial back-haul, and Des Moines, Cedar Rapids, Davenport and Dubuque. On routes not through a rate-break point Springfield and St. Louis, Missouri, Springfield and Decatur, Illinois, and other points can transit on the 16 cent rate, while Omaha must pay 22 1/2c.

Among the interior points that can transit on the 16c rate from Omaha to Chicago on routes through Kansas City (Plate II) (R. 724) are Independence, Missouri, just outside the switching limits of Kansas City, Sedalia, Jefferson City, and St. Louis, Missouri, Alton and Springfield, Illinois. All of these can transit on the 16 cent rate, while Kansas City, Atchison, Leavenworth, and St. Joseph, merely because they are rate-break points, are denied the right to do so and must pay 22 1/2 cents. Other interior points shown on this map not located on rate-break routes are Des Moines, Dubuque, Cedar Rapids, Clinton, Davenport, Burlington, and Hannibal, all of which can transit on the 16 cent rate.

In connection with Plate II (R. 724), we wish to point out that the effect of the Commission's orders is to require the intermediate primary markets to pay more than the rate-break combination on the first primary markets. The rate from Holdrege, Nebraska, to Omaha is 17 1/2 cents. Any interior point shown on any of the routes between Omaha and Chicago can transit grain from Holdrege, Nebraska, to Chicago by paying the proportional rate of 16 cents from Omaha in addition to the inbound rate of 17 1/2 cents, or a total of 33 1/2 cents. On the other hand, Kansas City, located on several of these routes, in order to transit grain from Holdrege, is required to pay 22 1/2 cents in addition to the 17 1/2 cents from Holdrege to Omaha, or a total of 40 cents.

Now the rate-break combination of 33 1/2 cents was prescribed by the Commission as a reasonable one-factor through rate, and yet Kansas City must pay 40 cents in order to transit although located on a route over which the lower rate applies, and that notwithstanding the fact that Independence, Sedalia, Jefferson City, and numerous other points on the route through Kansas City can transit on the rate of 33 1/2 cents. This is but an illustration of the situation which exists whenever transit is taken at an intermediate primary market.

Plate III (R. 725) (already discussed at the beginning of this statement) shows some of the routes from Omaha to St. Louis over which a proportional rate of 14 cents applies. As already pointed out, there is only one shorter route than through Kansas City and that is the Wabash. All other routes are substantially longer. Yet any of the points shown, including Fort Dodge, Dubuque, Cedar Rapids, Clinton, Des Moines, Davenport, Hannibal, Peoria, and Springfield can transit on the 14 cent rate, whereas Kansas City, Atchison, Leavenworth, and St. Joseph, merely because they are rate-break points, are required to pay a combination of 6 1/2 cents plus 12 cents (the proportional rates from those points to St. Louis) or a total of 18 1/2 cents. All of the points shown on the circuituous route of the Rock Island Railway in Nebraska and Kansas, such as Lincoln and Topeka, can transit on the 14 cent rate to Kansas City, while Kansas City, on the almost direct line of the Missouri Pacific and the Rock Island must pay 18 1/2 cents.

Plate IV (R. 726) shows routes from San Antonio, Texas, to St. Louis, some of which are via Kansas City. The rate from San Antonio to St. Louis is 46 cents, which applies over the routes through Kansas City. Fort Worth, Enid, Wichita, Topeka, Muskogee, Sedalia, Jefferson City, and even Hutchinson and Salina, which involve substantial back-hauls, can transit on the 46 cent rate on the route via Kansas City to St. Louis, whereas Kansas City must pay a combination of 42 cents from San Antonio

to Kansas City and 12 cents from Kansas City to St. Louis, or 54 cents for exactly the same transportation and transit service.

A similar situation is shown by Plate V (R. 727) which is another illustration of routes from country points, one of which is via Kansas City. The rate from Indianola to St. Louis is 20 cents, on which Des Moines, Keokuk, Pleasant Hill, and other points can transit, whereas Kansas City must pay a rate of 29 cents for the same service, though it is on the same route as Pleasant Hill.

The evidence in the records before the Commission (which were transmitted to this Court pursuant to stipulation of counsel) shows that the situations complained of are very important, that in the Omaha-Kansas City situation alone before the orders in question Kansas City dealers annually handled large quantities of wheat from Omaha, estimated by various witnesses as high as 8,000,000 to 10,000,000 bushels annually, but never less than 500,000 bushels (See record in case No. 27628, pp. 58, 59, 82, 216, 414, 638, 745, 1001). The evidence showed that since the Commission's orders became effective on July 1, 1935, the rate penalties applicable when transit is had at Kansas City cannot be overcome and that very little of the business formerly done now exists (See record in case No. 27628, pp. 84, 217, 229, 423, 529, 805, 638, 745, 1001, 1486).

It is of the greatest importance that there should be an interchange of wheat between Omaha and Kansas City for milling purposes. Under normal conditions, Nebraska produces low protein wheat, while Kansas produces high protein wheat, and both are necessary for blending purposes to make the different varieties of flour (See record in case No. 27580, pp. 8, 16, 27). The existence of this situation was recognized by the Commission (223 I. C. C. 239, R. 618).

The same is true of the other situations. Because of the proportionals from Omaha to St. Louis, Kansas City

shippers have lost their business because they cannot compete without transit on the Omaha rates (pp. 805-810, 843).

The state of Iowa is one of the most important producing sections for coarse grains. The Kansas City market has always been in competition with the St. Louis and interior markets. Because of the situation resulting from the Commission's orders and illustrated by Plate V (R. 727) the Kansas City shippers have lost their business to their interior and other competitors (pp. 804, 805, 809-812, 1508).

No Difference in Service or the Cost Thereof.

This substantial difference in rates exists although the transit service which shippers at the terminal markets receive (and the cost thereof to the railroads) is exactly the same as or comparable to that received by shippers at interior points. Nowhere in any of the Commission's opinions did it find any difference in the nature of the transit service or the cost thereof. On the contrary, as will be more fully developed in the argument the Commission found that the transportation service involved in transit, the cost thereof, and the mechanics of transit are the same whether the transit is on the rate break combinations or otherwise (164 I. C. C. 634, R. 42; 215 I. C. C. 90, R. 538).

Complaints Filed and Relief Granted.

The Board of Trade of Kansas City, the Omaha Grain Exchange, the Atkinson Milling Company and other milling companies filed complaints with the Interstate Commerce Commission seeking relief from the prejudicial rates and practices (R. 586-613). On July 27, 1937, the Commission filed and entered its report and order wherein it found that its findings and orders previously entered should be modified authorizing restricted departures from the exclusive application of proportional rates at rate-

break points. In that report the Commission found that the granting of the relief sought would not change a single rate in effect but would merely permit the terminal markets to transit on an equality with interior transit operators on the same rates over the same routes (223 I. C. C. 239, R. 618). It further found that the granting of this relief would not adversely affect the rate structure (223 I. C. C. l. c. 239 and 244, R. 618, 624). In that report, however, the Commission did not require the carriers to grant the authorized relief. Its order was permissive and after its adoption the carriers refused to comply.

Subsequent Denial of Relief.

Upon the failure of the carriers to grant any relief the Complainants sought a mandatory order. This was refused in an opinion in which a majority of the Commission reversed the position taken in 223 I. C. C. 235, and refused to grant any relief whatsoever (229 I. C. C. 9, R. 635). On reargument a majority of the Commission again denied relief (231 I. C. C. 793, R. 648).

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

The points raised by the assigned errors were summarized in appellants' statement of points upon which it intends to rely (R. 768) and the same are here set forth as its specifications with appropriate reference to the assigned errors (R. 757) upon which they are based.

1. The District Court erred in not holding that it appears from the face of the record that there is no difference in the transportation and transit service or the cost thereof as between transit at primary markets and at interior points and hence that the orders of the Commission requiring the primary markets to transit on higher rates than interior points (or permitting transit at interior points on lower rates than at the primary markets) are in violation of Sections 1 (5), 2 and 3 (1) of the Interstate Commerce Act and are null and void (1, 2, 14, 15, 20, 47, 48, 49, 50, 62, 64).

2. The District Court erred in not holding that the grounds upon which the Commission denied the primary markets the right to transit on the same basis as interior points are insufficient as a matter of law to constitute a lawful basis or justification for the violations of the Act inherent in and resulting from the decisions and orders of the Commission (11, 51, 53, 54).

3. The District Court erred in not holding that the grounds upon which the Commission refused to grant appellants any relief from the discrimination and prejudice against them and against the primary markets and denied their complaints, are insufficient as a matter of law to constitute a lawful basis or justification for such orders (17, 55, 56, 57, 58).

4. The District Court erred in not holding that the orders of the Commission are so unjust, unreasonable and arbitrary as to render them null and void (12, 60).

5. The District Court erred in failing to recognize and give effect to the foregoing propositions and in not holding that the orders of the Commission, in so far as they prohibit transit at the primary markets on the same basis as at interior points, are unlawful, null and void (3, 4, 5, 6, 7, 8, 16, 17, 19, 23, 24, 25, 62, 64).

SUMMARY OF ARGUMENT.

1. Where as here the reports disclose discrimination that is palpably unjust and forbidden by the Interstate Commerce Act, this court will grant relief regardless of any contrary findings of the Commission (See discussion and authorities under Point I(A)).

2. Where the reports of the Commission disclose that it has exceeded its powers and misapplied the law, its findings, conclusions and orders are void and of no effect (See discussion and authorities under Point I(A)).

3. The Commission did not find any difference in the transit service or the cost thereof as between primary and interior points and its orders prescribing higher charges for transit at primary points subject shippers at such points to unjust and unreasonable charges, unjust discrimination and undue and unreasonable prejudice in violation of Sections 1 (5), 2 and 3 (1) of the Interstate Commerce Act. The courts and the Commission have frequently held that such differences in charges as are here prescribed cannot be sustained unless there is a difference in the transportation service or the cost thereof, which the findings of the Commission show does not exist in this case (See discussion and authorities under Point I(B)).

4. The grounds upon which the Commission denied the primary markets the right to transit on the same basis as interior points are insufficient as a matter of law to constitute a lawful basis or justification for the violations of the Act inherent in and resulting from the decisions and orders of the Commission. The Commission's holding in 215 I. C. C. 83, l. c. 90 (R. 538) that there is a substantial difference in conditions affecting interior transit points and rate-break markets which justifies the

difference in treatment prescribed by the Commission was based upon other than lawful transportation considerations and cannot be sustained. As shown by its opinions, the Commission attempted to justify such difference in treatment because rates break at the primary markets, wholly disregarding the fact that rates break at such points because of their advantageous geographical location and their situation with respect to the lines of various railroads, and wholly ignoring and disregarding the fact that the courts, as well as the Commission, have repeatedly held that the Commission does not have the power to equalize or offset any such competitive advantages of one point over another by allowing more favorable rates to the one over the other as the Commission did here (See the discussion and authorities under Point II(A) 1 and 2).

5. Even if any advantage exists because the primary markets have the rate-break or because of any other factors, this is no lawful basis for creating a discriminatory and prejudicial adjustment for the purpose of offsetting the alleged advantages, as it is the function and purpose of Sections 1 (5), 2 and 3 (1) of the Interstate Commerce Act to uproot all discriminations rather than to create discrimination for the purpose of offsetting advantages of other points (See the discussion and authorities under Point I(A) 3).

6. The Commission sought to excuse the discrimination against the primary markets by saying there was a difference in the "forms of transit" as between such markets and interior points, wholly ignoring the fact that its opinions show that there is no difference in the forms of transit but that the mechanics of transit, the purpose of transit, the cost thereof to the railroads and every physical incident of the transit operation is exactly the same whether transit is taken at the primary markets or at other points (See the discussion and authorities under Point III).

7. The grounds upon which the Commission refused to grant complainants any relief from the discrimination against them and against the primary markets and denied their complaints are insufficient as a matter of law to constitute a lawful basis or justification for such orders. The Commission's position that the relief sought should be denied because to allow it would disturb and disrupt the rate structure, reestablish the dual system and impose an additional burden upon the carriers, is insufficient in law to justify the Commission's refusal to remove the existing discrimination as the courts have frequently held that it is no basis for denying relief from a substantial discrimination that to grant such relief will disturb the rate structure or affect the revenue of the carriers (See discussion and authorities under Point III(A) 1).

8. The opinions of the Commission show that if it grants the relief sought it has the power to keep the situation under control so that the unrestricted dual system is not reestablished and the rate structure not unduly affected (See discussion and authorities under Point III(A) 2).

9. The dissenting opinions of Commissioners may be considered in determining the basis for the Commission's orders and these show that the majority applied erroneous legal principles and exceeded their lawful powers (See discussion and authorities under Point IV).

10. The opinion of the trial court shows that it wholly overlooked and ignored the principal issue, viz., whether such a substantial difference in transit charges is lawful under the provisions of the Interstate Commerce Act where the transit service and the cost thereof is the same at both primary and interior markets. The opinion also shows a number of fundamental misconceptions which directly contributed to the erroneous result reached by that court (See discussion and authorities under Point V).

Pertinent Provisions of the Interstate Commerce Act.

"Sec. 1, par. (5): *Just and reasonable charges required; classification of messages, and rates; exchange of services.* All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: * * *

"Sec. 2: If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

"Sec. 3 (1): It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, or any particular description of traffic, in any respect whatsoever or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"Sec. 15 (1): Whenever, after full hearing, upon a complaint made as provided in section 13 of this chapter, or after full hearing under an order for in-

vestigation and hearing made by the commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property or for the transmission of messages as defined in the first section of this chapter, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

ARGUMENT.

I.

It Appears from the Reports and Orders of the Interstate Commerce Commission That There Is No Difference in the Transportation and Transit Service or the Cost Thereof As Between Transit at Primary Markets and at Interior Points, and Hence That Its Orders Requiring the Primary Markets to Transit on Higher Rates Than Interior Points (or Permitting Transit at Interior Points on Lower Rates Than at the Primary Markets) Are in Violation of Sections 1 (5), 2 and 3 (1) of the Interstate Commerce Act and Are Null and Void.

(a) Where, as here, the findings and orders of the Commission are based upon the application of erroneous rulings, not in accord with the law, such findings and orders are not binding upon the courts and will be set aside.

While this Court will ordinarily accept the Commission's findings of facts and will not attempt to substitute its opinion for that of the Commission upon administrative questions, it will not permit the Commission's general findings and conclusions to prevent the setting aside of orders which are the result of the application of erroneous rules of law or which are in excess of the powers of the Commission.

Mitchell v. *U. S.*, 85 L. Ed. (Adv.) 811.

The Interstate Commerce Commission v. *Union Pacific R. R. Co.*, 222 U. S. 541, 56 L. Ed. 608.

Southern Pacific Company v. *Interstate Commerce Commission*, 219 U. S. 433, 55 L. Ed. 283.

Ann Arbor R. Co. v. *United States*, 281 U. S. 638, 74 L. Ed. 1098.

Texas & Pacific R. R. Company v. *United States*, 289 U. S. 627, 77 L. Ed. 1410.

Alton R. R. Company v. *United States*, 287 U. S. 229.

In *Mitchell* v. *United States, supra,* decided on April 28, 1941, this Court held that the general findings of the Commission of the absence of undue and unjust discrimination were not binding upon the Court and would be disregarded where the facts showed an obvious discrimination forbidden by Section 3 (1) of the Interstate Commerce Act. The opinion of the Commission in that case is reported in 229 I. C. C. 703. Mitchell, a colored person, claimed that the failure of the Chicago, Rock Island & Pacific Railway Company, to furnish him with the same or equivalent facilities as those furnished to white passengers was an unlawful discrimination forbidden by the provisions of the Interstate Commerce Act. The Commission held that the discrimination and prejudice was not unjust and undue. After reviewing the facts, the Commission said as follows (229 I. C. C. l. c. 711):

> "In these circumstances, we find that the present colored passenger coach and the Pullman drawing rooms meet the requirements of the Act; and that, as there is comparatively little colored traffic and no indication that there is likely to be such demand for dining car and observation parlor car accommodations by colored passengers as to warrant the running of any extra cars or the construction of partitions, the discrimination and prejudice is plainly not unjust or undue. Only differences in treatment that are unjust or undue are unlawful and within the power of this Commission to condemn, remove and prevent. The complaint will be dismissed."

The Court held that such findings by the Commission were not binding upon it and would not prevent it from applying the provisions of the statutes to a clear case of discrimination and prejudice. The Court, in a unanimous opinion by Chief Justice Hughes, said that the discrimination was palpably unjust and forbidden by the Act. It was said 85 L. Ed. (Adv.) 815, 816:

> "We have repeatedly said that it is apparent from the legislative history of the Act that not only was the evil of discrimination the principal thing aimed

at, but that there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach. Shreveport Case (*Houston, E. & W. T. R. Co.* v. *United States*), 234 U. S. 342, 356, 58 L. Ed. 1341, 1350, 34 S. Ct. 833; *Louisville & N. R. Co.* v. *United States*, 282 U. S. 740, 749, 750, 75 L. Ed. 672, 679, 680, 51 S. Ct. 297; *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 512, 513, 75 L. Ed. 1227, 1237, 1238, 51 S. Ct. 505. Paragraph 1 of Section 3 of the Act says explicitly that it shall be unlawful for any common carrier subject to the Act 'to subject any particular person * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.' 49 U. S. C. A., Section 3.' * * *

"We take it that the chief reason for the Commission's action was the 'comparatively little colored traffic.' But the comparative volume of traffic cannot justify the denial of a fundamental right of equality of treatment, a right specifically safeguarded by the provisions of the Interstate Commerce Act. We thought a similar argument with respect to volume of traffic to be untenable in the application of the Fourteenth Amendment. We said that it made the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of that right is that it is a personal one. *McCabe* v. *Atchison, T. & S. F. R. Co.*, 235 U. S. 151, 59 L. Ed. 169, 35 S. Ct. 69, *supra*. * * *

"On the facts here presented, there is no room, as the Government properly says, for administrative or expert judgment with respect to practical difficulties. It is enough that the discrimination shown was palpably unjust and forbidden by the Act."

The principles applied in the foregoing case are directly applicable here. The discrimination complained of by appellants is as palpably unjust and forbidden by the Act as it was in the Mitchell case. The findings of the Commission to the effect that there was no unjust or undue discrimination and prejudice are the same in both cases. Neither in the Mitchell case, nor in this case, should

these general findings of the Commission be permitted to override the provisions of the Interstate Commerce Act which unequivocally forbid the type and character of discrimination and prejudice existing in this case.

In *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 56 L. Ed. 308, the Supreme Court said (222 U. S. l. c. 547):

> "There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. *Int. Com. Com.* v. *Ill. Cent.*, 215 U. S. 452, 470; *Southern Pacific* v. *Int. Com. Com.*, 219 U. S. 433; *Int. Com. Com.* v. *Northern Pacific*, 216 U. S. 538, 544; *Int. Com. Com.* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 174."

This Court has frequently set aside orders of the Commission in cases involving facts much like those in this case. In *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, 55 L. Ed. 283, it was held that an order of the Interstate Commerce Commission setting aside rates on lumber was void where it appeared from the opinions that the exclusion of shippers at Portland, Oregon, from the benefit of the reduced rate was based by the Commission upon the erroneous assumption that

it had the right to protect lumber interests from the consequences of a change in rates and could adjust the rate schedule accordingly. Upon reviewing the facts, opinions and evidence, the court concluded as follows (l. c. 449):

> "* * * we are of opinion that the face of the opinion and the order so additionally serve to make manifest the situation as to render it unnecessary to do more than briefly advert to those subjects. While it is true that the opinion of the Commission may contain some sentences which, when segregated from their context, may give some support to the contention that the order was based upon a consideration merely of the intrinsic unreasonableness of the rate which was condemned, we think when the opinion is considered as a whole, in the light of the condition of the record to which we have referred, it clearly results that it was based upon the belief by the Commission that it had the right, under the law, to protect the lumber interests of the Willamette valley from the consequences which it was deemed would arise from a change of the rate, even if that change was from an unreasonably low rate, which had prevailed for some time, to a just and reasonable charge for the service rendered for the future. Manifestly, this was deemed by the Commission to be the power which was being exerted, since Mr. Commissioner Harlan, joined by the Chairman of the Commission, dissented on the ground that the order was an exertion of a power not possessed, to give effect to a supposed equitable estoppel, and no language was inserted in the opinion to indicate to the contrary."

In *United States* v. *Chicago, Milwaukee, St. Paul & Pacific Railway Co.*, 294 U. S. 499, 79 L. Ed. 1023, an order of the Commission annulling scheduled rates filed by a carrier was enjoined despite general findings of the Commission that the proposed rates would be unreasonable and in violation of certain specified sections of the Act. The Court, upon examining the Commission's opinions, found that they were based upon a desire to preserve the rate structure rather than upon proper transportation considerations. The Court said (294 U. S. l. c. 506):

"The statement in the second of these paragraphs that the proposed rates would be 'unreasonable' must be read in the light of the report as a whole, and then appears as a conclusion insufficient as a finding unless supported by facts more particularly stated. Cf. *Florida* v. *United States, supra* (282 U. S. 213, 75 L. Ed. 303, 51 S. Ct. 119); *Southern P. Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, 449, 55 L. Ed. 283, 31 S. Ct. 298.

* * * * * * *

"Subjected to these tests, the finding by the Commission that the new rates are unreasonable is seen to be nothing more than a deduction from the paragraph immediately preceding, wherein we learn that the schedule, if put into effect, will disrupt the rate structure in Indiana and related areas and disturb groupings and differentials maintained for many years. This brings us to the question whether such disruption and disturbance may be deemed a sufficient reason for taking from a carrier the privilege of reaching out for a larger share of the business of transportation and initiating its own schedule to help it in the struggle.".

The court ruled that the disruption or disturbance of the rate structure was an insufficient basis for the Commission's order and after considering the opinions at some length held that the order should be set aside.

The report reviewed by the Supreme Court in *Ann Arbor Railroad Co.* v. *U. S.*, 281 U. S. 658, 74 L. Ed. 1098, contained a similar general finding and in holding this insufficient the court said (281 U. S. l. c. 666):

"* * * True, in both the original and supplemental opinions it is said that the existing rates are unreasonable, but the opinions taken as a whole show that this means the rates were deemed unreasonable under the joint resolution when construed as the commission construed it, and not that they were deemed unreasonable under Sec. 1 (5) or Sec. 3 (1) of the Interstate Commerce Act. Throughout the opinions it is manifest that the commission was testing the

reasonableness and validity of the rates by considerations not applicable under those sections but believed by it to have been brought into the problem by the resolution."

(b) The Commission did not find any difference in the transit service or the cost thereof as between primary and interior points and its orders accordingly subject the primary markets to unjust and unreasonable charges, unjust discrimination and undue and unreasonable prejudice in violation of Sections 1 (5), 2 and 3 (1) of the Interstate Commerce Act.

The pertinent provisions of the Interstate Commerce Act have been heretofore set out (pp. 31-32). Section 3 (1) specifically prohibits the granting of transit at one point on a more favorable basis than at another point. A more simple instance of a violation of such provision and of unreasonable charges, unjust discrimination and undue prejudice than that complained of in this suit can hardly be found. Here the transportation services rendered to complainants at terminal markets and to their competitors at other markets are exactly the same. The grain moves from the same origins over the same rails to the same destinations. The only difference is the point of stopover. If stopped at one of the primary markets, shippers are, in the instances complained of, compelled to pay substantially higher charges than their competitors are required to pay, although they may be immediately adjacent to such markets and although they receive exactly the same service and the cost thereof to the railroads is exactly the same.

The largest elevator in Greater Kansas City is located at Turner, Kansas, just inside the switching limits of Kansas City. If the Western boundary of the Kansas City switching limits were moved a few hundred feet, this elevator would automatically become entitled to transit on the through rates instead of the higher proportional rates applicable to Kansas City. Independence, Missouri, a few miles out of Kansas City, enjoys transit on the direct through rates, while Kansas City shippers must pay the higher charges.

The Commission did not claim that there is any difference in the transit service or the cost thereof which would support or justify this difference in treatment. Nowhere, in any of its opinions, is there any finding indicating or showing that there is any difference in the transportation service or its cost as between primary and interior points. If there had been any evidence of any difference in the transportation service incident to transit or the cost thereof, it is obvious that the Commission would have made a finding based upon such evidence. Such findings as appear in the Commission's reports are to the contrary. The Commission found that the mechanics of transit under the rate-break combinations prescribed for the primary markets are the same as under the through rates with transit balances applicable at interior points.

In 215 I. C. C. at page 90 (R. 538), the Commission said:

> "Transit permits of the drawing of grain into the transit point, and of the later outbound shipment of an equivalent tonnage of that kind of grain or its products, on the basis of the 1-factor through rate from the origin of the grain to the final transit destination. The local rate on the inbound shipment to the transit point is first paid, and the freight bill covering that shipment is recorded with the transit bureau, as evidence of intention of further transportation of the inbound grain (or its equivalent in tonnage) or its products. When the outbound shipment is tendered the inbound freight bill is surrendered as authority for the charging on the outbound shipment (in lieu of the local rate from the transit point that would otherwise apply) of the difference between the inbound local rate and the 1-factor through rate (the transit balance) from the origin of the grain to the final destination.
>
> "The foregoing are the mechanics of transit also under the rate-break combination, except that the outbound shipment under that combination is on a definitely published constant factor, instead of on the

unpublished and varying difference between the 1-factor rates to the transit point and to final destination. But there is a substantial difference in the effects of the transit operation under the two bases of through charge, due to the inherent difference in the character of the 1-factor through rates with transit and the rate-break combinations."

And in 164 I. C. C. at page 634 (R. 42) the Commission said that all the mechanics and incidents of transit on transit balances and transit on the proportional rates are the same. It is true that this statement was made with reference to transit on the proportionals and transit on the through rates at primary markets. But there is no difference in the service, or the cost of transit, on the through rates as between primary markets and interior points.

It is perfectly clear under the decisions that the difference in treatment which the Commission prescribed cannot be justified or supported unless there is a real and substantial difference in transportation considerations. It has been universally held by the courts and the Commission that any difference in treatment, in so far as transit is concerned, must be based upon a difference either in the transportation service rendered, its costs or upon other transportation conditions. This is well put in the case of *United States* v. *Illinois Central Railroad Company*, 68 L. Ed. 417, 263 U. S. 515.

> "It is true that the law does not attempt to equalize opportunities among localities (*Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46, 56 L. Ed. 83, 87, 32 Sup. Ct. Rep. 22); and that the advantage which comes to a shipper merely as a result of the position of his plant does not constitute an illegal preference (*Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, 445, 59 L. Ed. 1036, 1041, 35 Sup. Ct. Rep. 645). To bring a difference in rates within the prohibition of Sec. 3, it must be shown that the discrimination practised is unjust when measured by the transportation standard. In other words,

the difference in rates cannot be held illegal unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions."

The charging of higher rates to some shippers than to others under similar circumstances is a violation of Section 1 (5) of the Interstate Commerce Act.

Penn Anthracite Mining Co. v. *Delaware & H. R. Corporation*, 16 Fed. Supp. 732, affirmed 91 F. 2d 634; cert. den. 302 U. S. 756, 82 L. Ed. 585.

Interstate Commerce Commission v. *Railway Co.*, 85 Fed. 107.

Whether rates charged by a carrier are just and reasonable is generally tested before the Commission by comparison with other rates for similar services. Absent the existence of other legitimate transportation considerations, a difference in rates for the same services cannot be upheld. The Commission has frequently ruled it unreasonable under Section 1 to charge more for transit at one point than at another point when the transportation service is the same.

Henderson Commercial Club v. *I. C. R. R.*, 36 I. C. C. 20.

Flory Milling Co. v. *C. N. E. Railway*, 93 I. C. C. 129.

Similarly, it is equally well established that charging different rates under substantially similar circumstances results in a violation of Sections 2 and 3 (1) of the Commerce Act. Section 2 provides that a carrier shall not by any special rate or other device collect or receive from any person greater or less compensation than is received from other persons for a like service. In *Interstate Commerce Commission* v. *B. & O. R. Co.*, 225 U. S. 326, 56 L. Ed. 1107, the Supreme Court upheld the ruling of the Interstate Commerce Commission to the effect that differences with respect to competition between coal in-

tended for railway consumption and other coal and with respect to the manner of delivery do not provide dissimilar circumstances and conditions so as to justify the giving of a lower rate for the transportation of railway fuel coal than is given to shippers of other coal between the same points. In holding that a difference in charges under these circumstances would be a violation of Sections 2 and 3 of the Commerce Act despite the fact that fuel coal shipped was not in competition with commercial coal, the Court said (225 U. S. l. c. 341):

> "The issue of principle between the Commission and the companies is very accurately presented, and we come to consider whether there are differences in the traffic of fuel coal which distinguish it from traffic in commercial coal, and which, as contended by the companies, make the traffic dissimilar in circumstances and conditions, or whether the opposite is true, as decided by the Commission.
>
> "The circumstances and conditions which may so far be considered as distinguishing traffics so far as to take from different transportation charges the vice of preference have been described by this court. In *Wight v. United States*, 167 U. S. 512, 518, 42 L. Ed. 258, 259, 17 Sup. Ct. Rep. 822, it is said: 'It was the purpose of the section (2) to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor.' These words are given more precision by the declaration 'that the phrase, "under substantially similar circumstances and conditions," as found in Section 2, refers to matter of carriage, and does not include competition.' And this was repeated in *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 161, 166, 42 L. Ed. 421, 423, 18 Sup. Ct. Rep. 45. The facts in both cases give significance to the rulings. In the first case the charges to the shippers were the same, but one was given extra facilities; in the second case the extraneous effect of competition was excluded as an element in the application of the section. There is also example in *In-*

terstate Commerce Commission v. *Delaware, L. & W. R. Co.*, 220 U. S. 235, 55 L. Ed. 448, 31 Sup. Ct. Rep. 392. It was there held that a carrier could not look beyond goods tendered to it for transportation in carload lots 'to the ownership of the shipment' as the basis for determining the application of its established rates. Do the circumstances and conditions in this case give a greater power of discrimination and justify the lower charge to railroad-fuel coal? It is admitted that the fact that a railroad is the shipper or consumer is not a circumstance or condition that affects the carriage, nor can the different uses to which the coal may be put; and it would seem necessarily that any other extraneous condition or circumstance could have no greater potency. Once depart from the clear directness of what relates to the carriage only and we may let in considerations which may become a cover for preferences. May a carrier look beyond the service it is called upon to render to the attitude and interest of the shippers before, or their attitude and interest after, transportation? It must be kept in mind that it is not the relation of one railroad to another with which we have any concern, but the relation of a railroad to its patrons, who are entitled to equality of charges."

The Court then discussed the differences urged by the carriers and held that they did not justify a different charge because "such features do not affect the carriage, quality or alter the essential service which is to get an article from one place to another."

When Section 3 (1) was amended in 1935 it was changed so as to expressly forbid any undue or unreasonable preferences to any "transit point." The Commission has in many cases held that where two transit points are upon the same route between a given origin and a given destination, a difference in charges for the through transportation as between the two transit points is unduly prejudicial. *Commercial Club of Omaha* v. *C., R. I. & P. Ry.*, 6 I. C. C. 647; *Hock* v. *Penna. R. Co.*, 10 I. C. C. 675; *St. Louis Hay & Grain*

Co. v. *M. & O. R. Co.*, 11 I. C. C. 90; *Sondheimer* v. *I. C. R. Co.*, 17 I. C. C. 60; *Transportation of Wool, Hides and Pelts* 23 I. C. C. 151; *Railroad Com. of La.* v. *St. L. S. W. Ry. Co.*, 23 I. C. C. 31, 48; *Paducah Board of Trade* v. *C., B. & Q. R. R. Co.*, 37 I. C. C. 743, 751, 758; *Henderson Commercial Club* v. *I. C. R. R. Co.*, 36 I. C. C. 20, 28; *Kornfalfa Feed Milling Co.* v. *A., T. & S. F. Ry.*, 38 I. C. C. 307; *Fabrication-in-transit Charges*, 29 I. C. C. 70; *Dallas Chamber of Commerce* v. *A., T. & S. F. Ry.*, 40 I. C. C. 619, 646; *Nashville Flour Transit Rules*, 41 I. C. C. 483; *Eldred Milling Co.* v. *C., N. O. R. R. Co.*, 42 I. C. C. 215, 220; *Buffalo Grain Cases*, 46 I. C. C. 570, 583; *Chicago Bridge & Iron Co.* v. *Erie R. R.*, 46 I. C. C. 641; *Business Men's League of Helena* v. *Ry. Co.*, 48 I. C. C. 490; *Strasburg Steam Flouring Mills* v. *S. Ry. Co.*, 53 I. C. C. 52, 58 I. C. C. 337, 339; *Mercantile Lumber Co.* v. *I. C. R. R.*, 53 I. C. C. 663; *Indianapolis Board of Trade* v. *B. & O. R. R. Co.*, 64 I. C. C. 416; *South Dakota R. R. Co.* v. *Director General*, 73 I. C. C. 347; *Fort Worth Freight Bureau* v. *B. S. L. & W. Ry. Co.*, 74 I. C. C. 601; *Buehrle Co.* v. *B. & O. R. R.*, 87 I. C. C. 303; *Compression, Concentration, and Storage of Cotton*, 91 I. C. C. 472; *Flory Milling Co.* v. *C. N. E. Ry.*, 93 I. C. C. 120; *Rodney Milling Co.* v. *M. P. R. Co.*, 93 I. C. C. 200; *Lange & Crist Box Lumber Co.* v. *B. & O. R. Co.*, 93 I. C. C. 207; *Marshall M. & E. Co.* v. *K. C. S. Ry. Co.*, 101 I. C. C. 270; *Minnesota-Dakota Transit Millers* v. *A. A. R. R. Co.*, 118 I. C. C. 585; *American Grain & Hay Co.* v. *I. C. R. R. Co.*, 129 I. C. C. 225; *Three Forks Portland Cement Co.* v. *C., B. & Q. R. R. Co.*, 129 I. C. C. 107, 118; *Jackson Traffic Bureau* v. *A. & V. Ry. Co.*, 122 I. C. C. 387; *Hobbie Elevator Co.* v. *L. & N. R. R. Co.*, 142 I. C. C. 566; *Sperry Flour Co.* v. *C., R. I. & P. Ry.*, 152 I. C. C. 467; *Birmingham Traffic Bureau* v. *I. C. R. R.*, 155 I. C. C. 676; *Inland Empire Mfrs.' Asso.* v. *A. & S. Ry.*, 165 I. C. C. 53; *Kansas Flour Mills Corp.* v. *A. & S. R. Co.*, 195 I. C. C. 277; 198 I. C. C. 701.

It is unnecessary to discuss each of these cases to show the consistent application of the principle which

they expound, but reference to a few will be made to show the positive views of the Commission when the question has been presented

In *Kansas Flour Mills Corporation* v. *Abilene & S. Ry. Co.*, 195 I. C. C. 277; 198 I. C. C. 701, a voluntary association of corporations and individuals engaged in milling grain at various points in Oklahoma filed a complaint with the Commission alleging that the rates and transit rules maintained in connection with grain shipments from points on the defendant's lines in Oklahoma to destinations in Texas were unreasonable, unjustly discriminatory and unduly prejudicial. The Pillsbury Flour Mills Company and the Kansas Flour Mills Corporation intervened and asked the same relief. Pillsbury asked such relief with respect to traffic accorded transit at Enid, Oklahoma, and the Kansas Flour Mills asked such relief as to grain accorded transit at Alva and Cherokee, Oklahoma, and Anthony, Kansas. It appeared that shipments of grain originating at points in Oklahoma, milled in transit at Enid and shipped to Abilene, Texas, were charged a rate of 35 cents. On the other hand, if the transit was taken at points on the Gulf Santa Fe Railway Company in Texas, although the shipments moved on the same route and through the same points, the rate thereon was 31 cents instead of 35 cents. There were a number of other applications of the same rates and in fact it appeared that shipments transited at points in Oklahoma and Anthony, Kansas, paid the higher rate while, if the same shipments were transited on points on the Gulf Line in Texas moving over the same route, they paid a lesser total rate. The evidence showed that the points were in competition and that the complainants, transit operators at the Oklahoma and Kansas points, were in competition with transit operators at the other points enjoying the lower rate.

Division Two of the Commission held that this difference in rates in favor of Texas transit points as against

Oklahoma transit points constituted "a clear case of undue prejudice and preference." It was said (l. c. 284):

> "We further find that the maintenance and application by defendants of their present transit rules and practices on shipments of grain, in carloads, from origins on their lines in Oklahoma and Texas, milled in transit at points on their lines in Oklahoma and at Anthony, Kansas, and forwarded therefrom as grain products to destinations in Texas, which transit rules and practices are less favorable and result in higher through charges on said traffic than are contemporaneously applied by defendants on similar shipments from and to the same origins and destinations when milled in transit at points on the line of defendant Gulf, Colorado and Santa Fe Railway Company in Texas, results and will result in undue prejudice to the complaining millers, and their traffic, at transit points in Oklahoma and at Anthony, and undue preference of competing millers, and their traffic, located at transit points on the line of the Gulf, Colorado and Santa Fe in Texas."

The foregoing ruling of Division Two was upheld and approved by the full Commission in its opinion in 198 I. C. C. 701. It was said (l. c. 704):

> "The facts and contentions of the parties with respect to the allegation of undue prejudice and preference are set forth in the former report and need not be repeated here. The complaint in No. 23901 did not assail the transit rules at Anthony and no finding should have been made as to the lawfulness of those rules under Section 3 of the Act. In all other respects we affirm the findings of division 2, that the maintenance and application by defendants of their present transit rules and practices on shipments of grain, in carloads, from origins on their lines in Oklahoma and Texas, milled in transit at points in Oklahoma on the Santa Fe, and forwarded therefrom as grain products to destinations in Texas, which transit rules and practices are less favorable and result in higher through charges on that traffic than are contemporaneously applied by defendants on similar shipments from and to the same origins and destinations when

milled in transit at points in Texas on the line of the defendant Gulf results and will result in undue prejudice to the complaining millers and their traffic, at transit points on the Santa Fe in Oklahoma, and undue preference of competing millers and their traffic, located at points in Texas on the line of the Gulf."

And in *Royal Milling Co.* v. *G. N. Ry.*, 47 I. C. C. 263, 265, it was said:

"In previous opinions the Commission has considered the importance of granting transit upon grain at all points on a through route at which transit may be used, so as to prevent undue preference and advantage to terminal and rate-breaking points. *In re Transportation of Wool, Hides and Pelts*, 23 I. C. C. 151; *Southern Illinois Millers Asso.* v. *L. & N. R. R. Co.*, 23 I. C. C. 672; *Missouri River-Illinois Wheat and Flour Rates*, 27 I. C. C. 286; *Fabrication in Transit Charges*, 29 I. C. C. 70; *Henderson Commercial Club* v. *I. C. R. R. Co.*, 36 I. C. C. 20."

The Commission has in the past clearly seen that the smallest fractions affect the trade in grain and that equality is not achieved when there is any difference in rates whatever. In *Strasburg Steam Flouring Mills* v. *S. Ry.*, 53 I. C. C. 52, the Commission said:

"We have frequently held that a charge not exceeding 0.5 of a cent is reasonable for this additional service. But we have also condemned the discrimination which results from the collection of such a charge at one milling point while no charge is made at other milling points on the through route, including rate-breaking points where the rates to or from the latter points are essentially parts of the through rates. *Southern Illinois Millers Asso.* v. *L. & N. R. R. Co.*, 23 I. C. C. 672, 677."

And in another case: *Minnesota-Dakota Millers* v. *A. A. R. Co.*, 118 I. C. C. 585, 596, it was said:

"The grain and milling industry is highly competitive. A difference of a few cents per 100 pounds,

or even less, between competitors is frequently more than can be absorbed by the competitors suffering the disadvantage. A separate transit charge of 1.5 or 2.5 cents places the interior millers at a disadvantage in their competition with millers at Minneapolis, Duluth, and points farther east who are free from such a charge. This disadvantage is only partially offset by the advantage which the interior millers enjoy when shipping down the lakes. The disadvantage is traceable directly to the different policies of the lines serving western trunk-line territory in respect of transit. There appears no sound reason in law or economics for this difference in policy. It places the interior miller at a disadvantage which he should not be compelled to bear."

Nor has it made any difference that the transit point being considered was a market, or proportional rate point. Thus in *American Grain & Hay Co.* v. *I. C. R. R.*, 129 I. C. C. 225, proportional rates existed from Memphis to destinations in Arkansas and Texas, but the defendants having established overhead rates from Illinois points through St. Louis and Cairo on a basis less than the Memphis combinations, the Commission found that the failure to permit transit at Memphis on the overhead rates, as was done at St. Louis and Cairo, was prejudicial. Nothing in the report showed any thought then on the part of the Commission that transit at a proportional rate point was of any different character than transit at an interior point.

The decision of the Commission in *Tex-O-Kan Flour Mills Company et al.* v. *Atchison, Topeka & Santa Fe Railway Company*, decided on June 30, 1941, shows that the Commission, since its decisions in the instant case, has reached the opposite result and has held that undue prejudice and preference exists in a similar case. In that case the Tex-O-Kan Flour Mills Company, and other Texas milling companies, claimed that the failure of the defendant railroads to allow storage in transit at their places of business in Dallas, Fort Worth, Beaumont, Amarillo

and other Texas points on wheat flour shipped from points in Oklahoma, Missouri, Kansas, Nebraska and other states when reforwarded from the Texas points, while allowing such transit at Marshall, Texas, and at points in Louisiana, Arkansas, Oklahoma and other states, resulted in undue prejudice to complainants and their localities in violation of Section 3 of the Act.

The situations which were involved were practically the same as those in the instant case. In the Tex-O-Kan case, for example, a carload shipment of flour from Kansas City to Galveston, Texas, routed over the lines of the Atchison, Topeka & Santa Fe to Purcell, Oklahoma, and thence by way of the Gulf, Colorado and Santa Fe to Galveston, could be stopped and stored in transit at intermediate points, such as Oklahoma City and Ardmore, Oklahoma, and reshipped therefrom, for a through rate of 42c, but if the flour were stored at and reshipped from Ft. Worth, Texas, an intermediate point on the same route, the shipment was under the provisions of the defendants' tariffs, subject to a combination rate of 36c to Ft. Worth and 28c beyond, making a total of 64c. Similarly, a carload of flour shipped from Enid, Oklahoma, to LeCompte, Louisiana, could be stopped in transit at El Reno, Oklahoma, at Shreveport or Alexandria, Louisiana, or at Marshall, Texas, and reforwarded to destination on a through rate of 39c in each instance. In the event transit was taken at Fort Worth or Dallas, Texas, intermediate points on the same route, the applicable rate was a combination rate of 61c, composed of 28c to and 33c from Fort Worth and Dallas. It appeared that by reason of these higher combination rates, shippers at Dallas were unable to compete on the same basis as other competitive mills and that Dallas and Fort Worth shippers could not generally obtain flour from mills outside of Texas for blending with their products because of the higher combination rates.

The Commission pointed out that in its decisions in the Grain cases, a maximum of three stops in transit

without a charge in addition to the line haul rates, was authorized and held that under the facts presented, shippers at Fort Worth, Dallas and other points were being subjected to undue prejudice and their competitors at the other points to undue preference in violation of Section 3.

The Commission said:

> "We find that the failure of defendants to maintain on traffic under consideration, storage-in-transit arrangements at complainants' localities served by them in the State of Texas, while maintaining such arrangements for like traffic at localities in other States and at Marshall, Texas, on their lines, is not unreasonable, but results and will result in undue prejudice to complainants and complainants' localities in Texas and undue preference of the localities and shippers at those localities in the other States and at Marshall.
>
> "An order requiring removal of the undue prejudice and preference will be entered."

Another recent decision in which the same result was reached is that of the Commission in Investigation and Suspension Docket No. 4872 Grain, Oklahoma to Memphis, Tennessee, decided on August 5, 1941. In that case as the result of proceedings and adjustments in the Grain cases, various routes and rates were provided covering the movement of grain from Okahoma points to Memphis, Tennessee. However, no provision was made for a route from certain Okahoma points to Memphis and Arkansas points by way of Arkansas City, Kansas, thence over the Missouri-Pacific to destinations. As a result of subsequent proceedings, this route was provided. Subsequently, however, an attempt was made to cancel this route because the Secretary of the Commission had advised that the arrangements theretofore made did not satisfy the Act as the situations were not protected by the Fourth Section Order which had been procured. A cancellation was proposed which would subject shipments from Oklahoma origins transited at Arkansas City and there de-

livered to the Missouri-Pacific to combination rates .02c higher than the joint through rate of 34c. The effect of the proposal was to make the rate on shipments transited at Arkansas City 36c, while the 34c rate was applicable to a number of points on direct routes. The Court held that the proposed schedules would unduly prejudice Arkansas City and unduly prefer other points and that therefore they should be cancelled. It was said:

> "We conclude that under the proposed schedules Arkansas City on the Santa Fe would be unduly prejudiced, and surrounding points such as Anthony, Harper, Wellington, Winfield, Independence, and Coffeyville would be unduly preferred; and Arkansas City and Winfield on the Frisco would be unduly prejudiced and Fredonia and Cherryvale would be unduly preferred."

Section 15 of the Interstate Commerce Act (pp. 31-32) provides that where the hearing is by the Commission on its own initiative, the Commission may determine and prescribe just and reasonable charges and practices where it finds that the charges or practices in existence are or will be unjust or unreasonable or unjustly discriminatory or unduly preferential and prejudicial. Where the Commission acted pursuant to the power given under Section 15, as it did in the Grain Cases, its rulings and orders must satisfy the requirements of Section 1 (5), 2 and 3 (1) of the Interstate Commerce Act or its orders are void. *Baltimore & Ohio R. R.* v. *United States,* 298 U. S. 349, 80 L. Ed. 1209; *Brimstone R. R. Co.* v. *United States,* 276 U. S. 104, 72 L. Ed. 487.

Nor can it be urged that the Hoch-Smith Resolution gave the Commission greater power so that it was not bound by the requirements of Sections 1 (5), 2 and 3 (1) of the Commerce Act. In *Ann Arbor R. R. Co.* v. *United States,* 281 U. S. 658, 74 L. Ed. 1098, the Supreme Court ruled that the Hoch-Smith Resolution did not change the law in any respect, nor did it give the Commission any justification for not applying the statutory limitations existing theretofore.

In view of the foregoing, it cannot be denied that the orders of the Commission cannot be sustained unless the Commission has found some substantial difference in conditions which would constitute a sound and lawful basis for a difference in treatment of primary and interior markets.

This brings us to a consideration of the reasons relied upon by the Commission to justify its orders.

II.

The Grounds upon Which the Commission Denied the Primary Markets the Right to Transit on the Same Basis as Interior Points Are Insufficient as a Matter of Law to Constitute a Lawful Basis or Justification for the Violations of the Act Inherent in and Resulting from the Decisions and Orders of the Commission.

(a) The differences in conditions found by the Commission, which it relied upon as a basis for a difference in treatment of primary and interior markets, are legally insufficient to support the Commission's orders.

The question here is whether the differences in conditions relied upon by the Commission in its opinions to support the difference in treatment of interior and rate-break markets are proper transportation considerations sufficient in law to justify higher charges when transit is taken at primary markets than when taken at competing interior points. As has been pointed out in the statement of facts, there are numerous situations where all interior transit points along the various routes transit on the same basis and there is no discrimination. However, in the numerous instances complained of, the interior points have been permitted to transit on lower through rates, which lower rates have not been made available to shippers at primary markets. As heretofore pointed out, these exceptional cases have resulted in a serious and substantial injury to the primary markets and to shippers at such markets, for the simple reason that they cannot compete with interior points enjoying rates that are substantially lower.

1. The only differences found by the Commission are the direct result of natural conditions existing at interior and rate-break markets.

In the first and second grain cases, the Commission was dealing with a situation prevailing at the primary markets which the Commission found to be undesirable and to effect a discrimination against some shippers at such markets in favor of other shippers at the same markets.

Nowhere in those opinions did the Commission find or discuss any differences in conditions or find any other facts to support or justify a difference in treatment of primary and interior points. In its first decisions, the Commission did not permit interior points on rate-break routes to transit on the lower through rates. In fact, as heretofore shown, the Commission held that it was necessary to deny interior points on rate-break routes the right to transit on the lower through rates in order not to discriminate against rate-break markets. The Commission said (173 I. C. C. 516, R. 240):

> "The restriction is laid on the intermediate points other than the market, as well as upon the market, in order not to discriminate against the market in favor of the other intermediate points. The reason for the restriction as to all intermediate points would be apparent if the combination rate over the higher route were published as an overhead rate, for then, manifestly, transit would be accorded only at the higher rate applicable over that route.
>
> "The fact that the market may draw grain from a wider territory than the other intermediate points hardly affords justification for a difference in treatment."

It is very significant that in the foregoing the Commission expressly held that the fact that the market drew grain from a wider territory and consequently possessed various advantages did not afford a justification for dif-

ference in treatment. This position by the Commission was reaffirmed after the decision of the Supreme Court in *Atchison, Topeka & Santa Fe Railway* v. *U. S.*, 284 U. S. 248. At this time the Commission stated (205 I. C. C. l. c. 342, R. 321):

> "In the original report (page 645) an exception to the rule for the exclusive application of the rate-break combinations was made in respect of shipments through a rate-break market to meet the carrier competition of a lower-rated route, provided the shipments were not stopped at the rate-break market or other intermediate point on the equalized route, the rate-break combination to apply on shipments stopped in transit on that route. That finding, as more fully explained in the supplemental report (page 515) is adhered to."

Not until further consideration of the record in 215 I. C. C. 83 was this position changed. Here the Commission said (215 I. C. C. l. c. 89, R. 536):

> "It has been suggested that the main purpose of the findings in respect of the rate-break combinations (to require the exclusive application of the proportional rates on shipments from the rate-break markets to destinations to which published) would not be violated by so broadening the exception to meet carrier competition as to permit of transit at interior transit points on the route through a given rate-break market, in order to meet the lower rate over the competitive route between the same points, regardless of whether the interior transit points on the equalized route are also transit points on the cheaper route, provided that transit is not also accorded at the rate-break market on the equalized route. The suggestion may be illustrated as follows:"

Here was the first intimation that the prejudicial, discriminatory and unreasonable system which permits all interior transit points to transit on lower rates than terminal markets would be permitted. But the Commission recognized that this position, which was exactly contrary to its earlier view, would have to rest upon a

substantial difference in conditions affecting the interior transit points and terminal markets and said (215 I. C. C. l. c. 90, R. 538):

> "A modification on the basis suggested would have to rest upon a substantial difference in conditions affecting the interior transit points and the rate-break markets."

It will be noted that the Commission said that there must be a *substantial* difference in conditions. It then discussed the mechanics of transit and found that the mechanics of transit in the two instances are exactly the same "except that the outbound shipment under that combination (rate-break combination) is on a definitely published constant factor, instead of on the unpublished and varying difference between the one-factor rates to the transit point and to final destination" (215 I. C. C. l. c. 90, R. 538). In other words, the only difference found was that the outbound factor was constant at rate-break points which means only that the rates break at such points. The Commission then stated that there was a substantial difference "in the effects of the transit operation under the two bases of through charge, due to the inherent difference in the character of the one-factor through rates with transit and the rate-break combinations" (p. 90, R. 538). Accordingly, while the Commission stated that it was essential that there be a substantial difference in conditions, it found no difference in the mechanics of transit but sought to justify its position by a difference in the *effects* of the transit operation. And what were the differences in the effects of the transit operation?

The Commission stated that the rate-break combinations did not include limitations on out-of-line and backhaul movements usually found in the through rates and that such combinations did not require that out-bound movements be held to the lines of the inbound carriers, as is usually required on the through rates (215 I. C. C. 90-92, R. 538-40). It said that the effect of these differ-

ences between the rate-break and non-rate-break points when taken with the larger number of carriers found converging inbound to and radiating outbound from rate-break markets and the location and nature of such markets gave such markets an advantage in that they drew grain from a greater territory and possessed a greater choice of outbound carriers and that because of the nature of such markets as price-registering markets the published constant factor of proportional rates was beneficial to such markets.

The breaking of rates, the limitations as to out-of-line and backhaul movements and the requirement that outbound movements at interior points be held to the lines of the inbound carriers, are all the result of natural conditions prevailing at interior and rate-break markets. The reason Kansas City, Omaha and the other terminal markets are established as rate-break points is because the rates naturally break at such points, because these points are located where they are and because, for the most part, one set of railroad ends and another begins at these points.

The Commission recognized in these proceedings that the breaking of rates at these points is due to such factors and is not artificial. On page 634 of 164 I. C. C., the Commission referred to the breaking of rates as a "natural" one. The matter is clearly stated in the dissenting opinion of Commissioner Aitchison, in 231 I. C. C. l. c. 798, R. 654, as follows:

> "If there are advantages to certain rate-break markets inherent in the rate-break system, it is because the markets are located where they are and because they enjoy the service of many competing railways. These are advantages of their location, which it is not for us to attempt to equalize by condoning other substantial inequality in treatment of those points."

Prior to the decisions of the Commission in these proceedings, the rate-break was well established and it

was recognized and held in a number of cases that the advantages possessed by a rate-break market, including specifically the advantage of a great selection of outbound carriers, are advantages attributable to the location, and railway facilities of the rate-break point which cannot be offset by granting other points more favorable rates and that such advantages, by reason of such rate-breaks, do not constitute undue preferences to such markets, do not unduly prejudice other markets, and do not constitute any basis for allowing more favorable arrangements to other points.

In *Sioux City Terminal Elevator Co.* v. *Chicago, Milwaukee & St. Paul Railway Co.*, 23 I. C. C. 98, Sioux City, Iowa, asked for lower local inbound rates on grain and for the establishment of proportional rates outbound to the principal markets of distribution, including Chicago, Minneapolis and other points. It claimed that such an adjustment was necessary to place it upon substantial equality as a grain market with Omaha, Nebraska, and other competing markets which had the benefit of proportional rates and rate-break. No proportional rates were applicable outbound from Sioux City. Instead its grain was handled under joint through rates with transit for cleaning, milling or otherwise treating the grain. Sioux City was at the time a city with a population of 50,000 people, with elevator capacity capable of handling six million bushels a year. It had a Board of Trade, but no prices were quoted or grain sold thereon. Its functions were the determination of weights and grades in conjunction with the Western Weighing Association. The City claimed that by reason of its general standing financially and commercially, and its location on the Missouri River, it was entitled to the benefit of the rate-break with proportional rates and that it was subject to various disadvantages under the transit system as compared with the proportional basis. It was argued that under the applicable transit system, Sioux City was limited in its outbound move-

ments and its choice of markets. It prayed for the establishment of proportional rates instead of its existing system. The defendants contended that there was a substantial dissimilarity between Sioux City and Omaha and other points; that Sioux City was not a primary grain market and accordingly was entitled to no more in the way of rates and rate structures than many interior points. The defendants insisted that Sioux City's location on the Missouri River did not make it a natural breaking point for rates for the reason that east and west lines never terminated there, having been originally constructed through Sioux City, whereas Omaha and Kansas City were the Western termini of the principal trunk lines and a natural breaking point for rates. The Commission rejected the contentions of Sioux City and held that it had no power to equalize the advantages possessed by other terminal rate-break markets, and that the possession of such rate-break advantages did not constitute undue prejudice to Sioux City. It was said (23 I. C. C. 98, l. c. 108, 109):

> "Complainants admit that the suggested local rates to Soux City and proportions out will, in many instances, aggregate higher through charges on South Dakota grain than the present joint rates with Sioux City transit, thereby emphasizing the impression, which is strongly conveyed throughout the entire record, that what Sioux City wants is not so much the correction of a present substantial rate injustice as to be granted the additional benefits, whatever they may be, incident to proportional rates. Just what these additional advantages are, or why proportional rates, upon the facts of this record, are essential to Sioux City's growth as a market, is not satisfactorily shown. While defendants' witnesses differ on the subject, one testified, and the record in general seems to establish, that Omaha's greatest development as a grain market followed the institution of its proportional rates. It also appears that Omaha was a market of considerable proportions previous to their inception. Whether, therefore, proportional rates made Omaha, or Omaha's increasing demands made

the proportional rates, is perhaps a debatable question. But it seems clear that proportional rates alone do not insure a primary market for grain. On the other hand experience has demonstrated that rates adapt themselves largely to commercial and competitive conditions.

"Whether Sioux City is a primary market for grain, or entitled to be, is a matter of much discussion in this record. Just what constitutes a primary market has not been defined, if, indeed, the term is susceptible of minute description. One of the important essentials seems to be the ability to accumulate grain in large quantities from nearby territory for ready shipment to changing markets at the highest prices. But if we correctly understood this record, Sioux City now, by transfer of transit balances, has the same choice of markets as Omaha on all grain that does not involve a backhaul, including northern Wisconsin on all South Dakota grain originating south of Mitchell, which former state and the southeast are the chief territories of distribution alleged to be closed to Sioux City under the transit system; and we have seen that the southeast is open to Sioux City on South Dakota grain upon the Omaha combination.

"But conceding Sioux City's best development to be dependent upon proportional rates, there remains the question of the justification for an order by this Commission. It is established by this record and others before the Commission that competition has played an all-important part in Omaha and Kansas City's proportional rates. The present question, therefore, reduced to its simple state, is whether the Commission should order in proportional rates at Sioux City, where similar forces have not been asserted. Manifestly it is no part of the Commission's duty or right to equalize markets, except as that result may be incident to the correction of a substantial injustice in rates, in whatever form published at the respective competitive points.

* * * * * * *

"We need not further discuss the question as to whether Sioux City is a primary market for grain, or attempt to define the term. Whatever its status

in that respect, we find that competitive conditions exist at Omaha and Kansas City as determining factors in the establishment and maintenance of proportional rates that do not exist at Sioux City, and that the circumstances and conditions of transportation at the respective markets are substantially dissimilar. We also find that Sioux City, under the present joint rates with transit, is not laboring under such general disadvantage as a grain market, compared with Omaha under proportional rates, as to warrent the prayer of the petition."

In its decision on rehearing in the Sioux City case, 27 I. C. C. 457, the Commission reaffirmed its first opinion, that the rate-break is due to natural conditions arising out of the natural advantages possessed by rate-break markets and the competition of carriers for business. The Commission then pointed out that since the rate-break was due to these conditions it could not equalize or offset such advantages by authorizing the rate-break or other offsetting advantages at other points. However, the Commission said that if it had the power to equalize disadvantages between markets, then it would have the power to grant the relief sought by the complainants, but it said that it had no such authority and power. It was stated (l. c. 463):

If the Commission were considering all of the grain-carrying roads to, from, and through Sioux City, Omaha, and Kansas City, respectively, as one united system, under proper authority to do so, its findings in this case might or might not be different. Or were it proceeding under the right to deal with such matters as of general policy in the exercise of a wide discretion in the equalization of all disadvantages between markets and the like, the same observation would be pertinent. But the Commission has no such authority. It must consider these questions in accordance with the terms of the law which it is charged with administering, which gives full recognition to the separate organization and obligations of the individual carriers within its regulation and to the effect

of substantial differences in circumstances and conditions in the determination of whether the granting or withholding of a given rate or practice is unduly preferential or prejudicial. It therefore always has and necessarily must continue to recognize the effect of *bona fide* competition in the making of rates, and it would not be justified in this case in attempting to depart from that principle and requirement of the act. We are satisfied that there has been and is a substantial dissimilarity in the circumstances and conditions of transportation of grain through Kansas City and Omaha from those through Sioux City, and that the proportional rates from the former gateways were established and have since been maintained by reason thereof."

The Commission in the same report also said (l. c. 461):

> "The proportional rate, therefore, whether it is or is not to the advantage of Kansas City as a grain market, is due to the very competitive conditions to which we have already referred."

And, on page 462:

> "When all is said, the fact is that Sioux City is not as advantageously situated as are Omaha and Kansas City with respect to the grain it seeks to attract."

The same result as in the above case was reached in *Wichita Board of Trade* v. *Abilene & S. Railway Co.*, 29 I. C. C. 376. There the City of Wichita, Kansas, asked that it be made a rate-break market so that it could enjoy the benefits which it claimed resulted from the rate-break at points like Kansas City. Wichita contended that grain dealers at Kansas City had an advantage because under the rate-break in making outbound shipments they had a choice of all established routes without any restriction because the grain reached Kansas City by other lines. The Commission pointed out that interior points like Wichita used transit, which, though less desirable than the breaking of rates, was adequate, and held that the advantages

possessed by Kansas City because it was a rate-break point, could not be offset by granting additional privileges to Wichita or eliminating the rate-break. The Commission said:

> "In its complaint here, Wichita directs attention to the fact that Kansas City is a breaking point for rates upon grain moving from the west to the east and to the south. The grain dealer at Kansas City may ship grain to that point from the west, and may then reship such grain to points east and south thereof at a total transportation expense not greater than the rate on such grain from the interior point of origin to the point of final destination. In making the outbound shipment the Kansas City dealer has his choice of all established routes, without any restriction on account of the fact that the grain may have reached him by way of lines having rails beyond. In the tariff statements, these rates from Kansas City purport to be 'reshipping' rates, and an attempt is made to distinguish them from the so-called 'local' rates from Kansas City. So far as the case in hand is concerned, it is sufficient to say that they serve to carry all the grain forwarded from Kansas City to the east and south. They could carry no more if they were to be called what they really are, the only rates used or intended to be used between Kansas City and the destinations to which they apply.
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> "At points west of Kansas City, including Wichita, no such reshipping rates are provided; that is to say, rates do not break. Grain dealers shipping to and from such points find themseves forced to pay sums of local rates greater than the through rates from points of origin of the grain to the Missouri River or beyond, unless some other adjustment is made for the reduction of rates in or rates out, or both, so that the sum of the two shall be reduced to the amount of the through rate. The device generally adopted for this purpose is known as transit. Under it grain may be stopped and pass into the possession of the owner for cleaning, grading, mixing, milling, or other commercial process, and then go forward to a new destination at the balance of the through rate from the point from which it was first shipped, with,

at some points, a small charge for the services incidental to the delivery at the transit point.

"Transit is less desirable than the breaking of rates. At rate-breaking points the grain dealer or miller may ship by any line to any market regardless of the route of the inbound movement, while at transit points the commodity must go to the markets reached by the extension of the route of the inbound movement if the reduction of rates to the basis of the through rate is to be made.

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"The matters of which Wichita complains do not arise out of the failure to grant transportation at reasonable rates over fairly direct through routes. Speaking generally, the railroads have so conformed to the law that the grain dealers and millers of Wichita are able to reach all markets over practicable routes. It is when Wichita contrasts its own condition with the more favorable condition obtaining at Kansas City that complaint arises. Kansas City has the rate-breaking system, and Wichita has not. Kansas City thus has some advantages as a trading point intermediate between the fields and the places where the grain is consumed which Wichita, even with its transit system, is denied. It is descrimination of which Wichita complains and not unreasonableness.

"A finding that the discrimination between Wichita and Kansas City in the respects above noted is undue and an order that it be removed would be in effect an order that the rate-breaking system at Kansas City be abandoned rather than that it be adopted at Wichita. This is true, because every other market between the grain fields and the points of final consumption of the grain would have the same right as Wichita to demand that it also be relieved from this discrimination. If the discrimination were removed by extending the rate-breaking system, the final result would be that grain rates would be made on an arbitrary mileage system without reduction in the rate per ton per mile proportioned to the length of the haul. Such a result may finally be reached in rate making but the industries and commerce of the country are now established upon the present basis,

and great commercial hardship will inevitably attend the abandonment of the present system. The Commission, in the general public interest of all grain producers, grain dealers, and grain consumers, is constrained at this time to decline to undertake such a revolution."

In the foregoing it is significant that the Commission recognized the alleged advantage of rate-break points in a greater selection of outbound carriers, which is the alleged advantage the Commission emphasizes in the instant case. In the foregoing case it was held that this alleged advantage should not be offset by extending the rate-break to interior points like Wichita. If this be true, it is equally true that the Commission has no power to offset this alleged advantage by granting more favorable transit privileges to interior points, especially when it is done as in the instant case upon the express ground that such advantages to interior points are justified by the benefits resulting from the rate-break at terminal markets.

And in *Iowa Railroad Commission* v. *Director General*, 63 I. C. C. 405, the Commission held that Des Moines did not possess the features which made cities like Omaha and Kansas City rate-break terminal markets for grain and accordingly that the Commission had no power to equalize any advantages possessed by such rate-break markets. Here Des Moines, acting in behalf of grain dealers, filed a complaint alleging that the rates applicable to the transportation of grain and grain products at Des Moines were unreasonable and unduly prejudicial. The Boards of Trade and Chambers of Commerce of Kansas City, Omaha, Chicago and Milwaukee intervened, contending that Des Moines was not entitled to the relief sought. The grain dealers at Des Moines claimed that they were at a disadvantage and that Des Moines should be made a rate-breaking point like the Missouri River points. In rejecting this contention the Commission pointed out that the situation at the Missouri River cities was wholly un-

like that of Des Moines because the rates naturally broke at the Missouri River points for they were the termini of strong trunk lines from the West and from the East, and that such Missouri River points were the principal, primary grain markets having enormous grain storage capacities and facilities for handling grain. It was said:

> "The principal object of this proceeding is to have Des Moines made a rate-breaking point on grain traffic, like the Missouri and Mississippi rivers points, Chicago, Peoria, and other grain markets. Complainants' main reliance is upon the relative importance of Des Moines; its newly created grain exchange; the relationship of rates; and certain of our decisions bearing upon the making of rates on classes and commodities between Des Moines and other interior Iowa cities on the one hand, and points east of the Illinois-Indiana state line on the other. They introduced a number of exhibits to show that Des Moines is a commercial, shipping, and focal point of importance, to compare the growth in its population with that of the Missouri and Mississippi rivers cities, and to indicate its relative standing in point of population with other cities in the United States.
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> "Defendants' witnesses further testified that the situation at the Missouri River cities is wholly unlike that existing at Des Moines. Omaha and Kansas City are the termini of strong trunk lines from the west and from the east. In other instances through lines from the points of grain production to Chicago are in competition with lines terminating at the Missouri River. Such conditions do not obtain at Des Moines. The elevator storage capacity at the Missouri River. Such conditions do not obtain at Des that found at Des Moines. There was some testimony concerning primary and terminal grain markets which shows that Omaha was both a primary and terminal market before its proportional rates were established.
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> "Des Moines is an important commercial city, but it is not as advantageously situated as the Mis-

souri River cities with respect to this grain traffic. Those cities are either the termini of the principal carriers or on their main lines in direct route. Des Moines is on the direct lines of few carriers for east-and-west traffic, and in many instances is only reached by out-of-line hauls of such traffic. The conditions which brought about the proportional rates from the Missouri River cities are in nowise comparable with those existing at Des Moines. It must be recognized that carrier competition controls at the Missouri River, and may compel the establishment and maintenance of proportional rates on a basis lower than we would be justified in prescribing from Des Moines, where similar forces are not in strife. We can not equalize markets except to correct a substantial injustice in the rates. It does not appear that Des Moines, under individual and joint rates with transit service, is laboring under such a disadvantage as a grain market, in comparison with the Missouri River cities under proportional rates, as to entitle complainants to the relief sought."

There is one other similar case; *Helena Traffic Bureau* v. *Mo. Pac. R. R. Co.*, 89 I. C. C. 405. There Helena, Arkansas, claimed that it should be placed on a more favorable basis with reference to the rates on grain and grain products in order that it might be placed upon an equality with Memphis. Memphis was a primary grain market and a rate-breaking point. The Commission held that Helena was neither; that it did not do the business and possess the facilities to make it a primary market; and that it did not have the competitive conditions and the facilities for handling grain and its products to make it a rate-break point. The Commission said (l. c. 415):

"Memphis is a primary grain market and a rate-breaking point. Helena is neither. The fundamental issue is whether Helena should also be made a rate-breaking point. A locality has no inherent right to demand that rates break thereon. *Nashville Lumbermen's Club* v. *L. & N. R. R. Co.*, 40 I. C. C. 59, 61. Points on the banks of rivers or lakes in this country which are now accorded a rate-breaking arrangement

have it because they play an important part in some industry as a whole, or because the force of competition has gradually brought about such an adjustment. Memphis is a rate-breaking point because it is connected with the important grain regions of the country by numerous powerful trunk lines. From the west it is served by the Missouri Pacific, Frisco, Illinois Central, and Chicago, Rock Island & Pacific. In addition to the lines named, the Louisville & Nashville and the Nashville, Chattanooga & St. Louis are connections of direct lines serving the grain fields of the West. Any of these lines may bring grain in, and some, for example the Missouri Pacific and the Frisco with its connections, can tap the very grain fields of the West that are served by the Illinois Central, which, together with the Y. & M. V., its affiliated line, constitutes the chief outbound route into the Mississippi Valley.

"There is no similarity between Memphis and Helena from a transportation standpoint. Helena is off the direct route of any important carrier. It is served by branch lines of the Missouri Pacific, and the Y. & M. V., and by the main line of the Missouri & North Arkansas, a line of known financial weakness and traffic sparsity. *Division of Joint Rates and Fares of M. & N. A. R. R. Co.*, 68 I. C. C. 47."

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(l. c. 416):

"Furthermore, by not having facilities for the storage for large quantities of grain Helena lacks one of the elements necessary to entitle it to a rate-breaking adjustment. Its present storage capacity is about 250 carloads, as compared with a total storage capacity at Memphis of upwards of 7,000,000 bushels. Sack grain from other markets is chiefly shipped to Helena; bulk grain only is moved to Memphis. Memphis is the gateway for all kinds of grain and grain products to the South. Helena is only a jobbing point dealing chiefly in mixed livestock feed. As grain is now marketed in this country the existence of primary markets at such important gateways as Omaha, Kansas City, St. Louis, Chicago, and Memphis, with great storage facilities, is almost an economic

necessity, and rates are properly made to meet these existing conditions. But there is no general benefit to follow the establishment of such an adjustment at small jobbing points. Helena is doing no more business than many other jobbing points in the South and Southwest. We have denied requests for the establishment of rate-breaking adjustments at grain-handling points of far more importance than Helena. *Wichita Board of Trade* v. *A. & S. Ry. Co.*, 29 I. C. C. 376; *Iowa Railroad Commissioners* v. *Director General*, 63 I. C. C. 405; *Cairo Board of Trade* v. *A., T. & S. F. Ry. Co.*, 61 I. C. C. 219."

The rules applied in the foregoing cases were also approved in *Grain, Grain Products & Feeds*, 78 I. C. C. 209, and *Kansas City Board of Trade* v. *Alexandria & Western Railway Company*, 102 I. C. C. 285.

We respectfully urge that this court consider the foregoing cases carefully. All of these decisions show beyond any doubt that the alleged advantages which the Commission says justify a different basis for transit at primary markets than at competing interior points are the advantages of the rate-break markets, arising because of their location and railway facilities, which give rise to the rate-break, and that the existence of the rate-break and such advantages, if any, cannnot be made the basis for more favorable treatment of other points not similarly located.

2. The Commission has no power to off-set or equalize such natural advantages as may be possessed by rate-break markets and where it attempts to do so, as in this case, its orders are void and of no effect.

The decisions of the Commission discussed above show not only that the alleged advantages possessed by rate-break points are due to natural conditions, but also that the Commission has no power to equalize or off-set such advantages.

The Courts, as well as the Commission, have held in many cases that natural advantages such as those possessed by rate-break markets, cannot be equalized or offset by allowing a difference in rates or transit privileges to other points. In the leading decision of the Commission in *Ashland Fire Brick Co.* v. *Southern Railway Co.*, 22 I. C. C. 115, it was said (l. c. 121):

> "It seems unnecessary here to state that the power has not been lodged with this tribunal to equalize economic advantages, to put one market in competition with another, or to treat all the railroads as part of one whole."

The Federal courts, in approving this doctrine, have viewed its disregard as invalidating orders of the Commission. In all the following cases it was held that the Commission has no power to equalize natural advantages and if its orders are based upon such an attempt they are void:

Southern Co. v. *Interstate Commerce Commission*, 219 U. S. 433, 55 L. Ed. 283.

Texas & Pacific Ry. Co. v. *U. S.*, 289 U. S. 627, 77 L. Ed. 1410.

United States v. *Illinois Central R. Co.*, 263 U. S. 515, 60 L. Ed. 417.

Anchor Coal Co. v. *U. S.*, 25 F. 2d 462.

In *Southern Pacific Co.* v. *Interstate Commerce Commission, supra*, the court set aside an order of the Commission which declared an increased rate on lumber to be unreasonable. The court held that the Commission's order was void because it was in effect "based upon the belief by the Commission that it had the right under the law to protect the lumber interests of the Willamette Valley from the consequences which it was deeming would arise from a change of the rate."

The decision in *Texas & P. R. Co.* v. *United States*, 289 U. S. 627, 77 L. Ed. 1410, is directly in point. There the Galveston Commercial Association complained to the

Interstate Commerce Commission that certain rates were unreasonable and were unduly prejudicial to Galveston. The issue was one of prejudice to Galveston and preference to New Orleans. The court held that rates could not be adjusted with the motive of injuring or aiding a shipper or a particular kind of traffic or a locality and that to do so is to depart from the transportation standard required by the Act; that, while carriers may adjust rates to meet competitive situations between carriers, they cannot adjust rates for the purpose of equalizing facilities or advantages possessed by some localities over those possessed by others. The court said (289 U. S. l. c. 637):

> "While the carriers may, therefore, meet competition by equalizing rates or maintaining differentials both to interior points and to ports, they may not adjust their rates with the motive of injuring or aiding a shipper, a particular kind of traffic, or a locality, for so to do is to depart from the transportation standard, conformity to which the Act contemplates, and substitute others which are prohibited. A tariff published for the purpose of destroying a market or building up one, of diverting traffic from a particular place to the injury of that place, or in aid of some other, is unlawful; and, obviously, what the carrier may not lawfully do the Commission may not compel. *Southern P. Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, 444, 55 L. Ed. 283, 287, 31 S. Ct. 288; *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46, 56 L. Ed. 83, 87, 32 S. Ct. 22; *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, 445, 59 L. Ed. 1036, 1041, 35 S. Ct. 645; *United States* v. *Illinois C. R. Co.*, 263 U. S. 515, 524, 68 L. Ed. 417, 425, 44 S. Ct. 189; *Atchison, T. & S. F. R. Co.* v. *Interstate Commerce Commission*, (Commerce Ct.) 190 Fed. 591; *Anchor Coal Co.* v. *United States* (D. C.) 25 F. 2d 462, 471."

* * * * * * *

(l. c. 639):

> "It seems too plain for argument that the Commission has no authority, upon a showing by a gateway that under an existing tariff too much traffic

passes through another, or too little through it, to readjust the rates and prescribe differentials so as to divert traffic through the complaining gateway. The interests and industries of a gateway are not entitled thus to obtain a benefit reflected from additional traffic which would be diverted by such action of the Commission."

* * * * * * *

(l. c. 645):

"The Commission's three reports abound with statements that a differential in favor of the Texas ports will divert traffic running to New Orleans and send it through the Texas ports. Petroleum is one of the commodities as to which complaint was made. There is no transportation difference discoverable in the record between this traffic and that of the other freights affected by the order. But the Commission concluded that New Orleans was not receiving more than its fair share of this business, and that a differential advantage would be of little benefit to the Texas ports by diverting this commodity to them, and therefore refused to make any order respecting the rates on petroleum and its products. It has since, apparently upon similar considerations, refused to prescribe differentials in the rates on black-strap molasses. The actual basis of the decision is, moreover, avowed by the Commission. In the first report it said:

" 'We find that the present relationships of the assailed rates on export, import, and coastwise traffic are unduly prejudicial to Galveston and unduly preferential of New Orleans' (100 Inters. Com. Rep. 122).

"In its second report it stated:

" 'We find that the present parity of rates as between the Texas and Louisiana ports * * * does not result in substantial injury to the Texas ports in respect of petroleum and its products, but does result in substantial injury to and prejudice against the Texas ports in respect of the other commodities considered' * * * (128 Inters. Com. Rep. 388).

"And finally:

" 'Upon further consideration we now find * * * that the present relationships of the assailed carload rates on export, import and coastwise traffic * * * are, and for the future will be, unduly prejudicial to Galveston and the other Texas ports taking the same rates, and unduly preferential of New Orleans' (160 Inters. Com. Rep. 359).

"The action of the Commission cannot be justified upon any theory that it was protecting shippers and consignees, who would naturally desire all possible routes for foreign shipment. On the contrary, the orders prohibited a practice born of competition, and not proved to involve a loss of revenue to the appellants. *The plain purpose of the orders was to build up the Texas ports by diverting export and import traffic to them. As we have shown, Sec. 3 grants no such power.*"

In *United States* v. *Illinois Central R. Co.*, 68 L. Ed. 417, 263 U. S. 515, the court said (263 U. S. l. c. 524):

"It is true that the law does not attempt to equalize opportunities among localities (*Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46, 56 L. Ed. 83, 87, 32 Sup. Ct. Rep. 22); and that the advantage which comes to a shipper merely as a result of the position of his plant does not constitute an illegal preference (*Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, 445, 59 L. Ed. 1036, 1041, 35 Sup. Ct. Rep. 645). To bring a difference in rates within the prohibition of Sec. 3, it must be shown that the discrimination practised is unjust when measured by the transportation standard. In other words, the difference in rates cannot be held illegal unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions."

And as the court, in *Anchor Coal Co.* v. *U. S.*, 25 F 2d, said:

"The order here complained of should be enjoined because the Commission exceeded its powers, in that its action was based in part at least, upon in-

dustrial conditions, and was essentially an effort to equalize industrial (natural) conditions or offset economic advantages through adjustment of rates."

This point is covered in the instant case very clearly in the dissenting opinion of Commissioner Atchison, where he said (231 I. C. C. 793, 798, R. 654):

> "It does not justify the disparity to say that the rate-break markets have offsetting advantages which require us to condone or ignore otherwise unreasonable disadvantages those points are subjected to by the adjustment. The intent of the act we administer is that all unjust preferences shall be rooted out, not that they be balanced against each other and permitted to continue. If there are advantages to certain rate-break markets inherent in the rate-break system, it is because the markets are located where they are and because they enjoy the service of many competing railways. These are advantages of their location, which it is not for us to attempt to equalize by condoning other substantial inequality in treatment of those points."

The Commission has held in several cases that more advantageous transit arrangements granted to interior points than to rate-break points are unlawful regardless of the rate-break advantages possessed by such terminal points. One of the more recent decisions supporting this position is *St. Louis Live Stock Exchange* v. *Alton Railroad Company*, 198 I. C. C. 73, decided in 1933. This case involved a controversy between shippers at the principal live stock centers, which included Kansas City, Omaha and other points and the shippers at interior country markets, which included such points as Morris, Kansas; Prospect, Missouri; Emporia, Kansas; Valley and Fremont, Nebraska, and a number of other points. The large terminal public markets contended that the country markets were being granted preferences in transit privileges. They alleged that the railroads, by permitting transit which allowed live stock to be sorted, graded, consolidated and reforwarded at the country market at the bal-

ance of the through rate applicable from origin to ultimate destination, were unduly preferring the country points and that such practices were unduly prejudicial to the complainants. The evidence showed that the country markets were in competition with the complainants and that as a result of the transit practices shippers were subject to strong incentives to desert the principal markets in favor of the country points. The evidence showed that the principal markets enjoyed the greater business; that producers and packers prefer to do business at the public markets; that more modern facilities were available and that there was a greater amount of competitive bidding. The Commission upheld the complaint and ruled that the maintenance by the carriers of less favorable transit arrangements at the large Midwestern markets than those maintained at the country markets resulted in undue prejudice to the principal markets and undue preference in favor of the country markets. It was said (l. c. 96):

> "In our report on further hearing in the livestock investigation we referred to the effect of the application of the stocker and feeder rates to these country-market points adjacent to the Missouri River markets, the sale of the livestock thereat, and its shipment therefrom at the balance of the through or joint rates, whereas the lower basis did not apply to, and the sale-in-transit arrangements did not obtain at, the Missouri River markets. In that report we modified our previous findings to the extent that the carriers should not be required to maintain rates on stockers and feeders on the 85-percent basis to points at which public feed yards for livestock were maintained.
>
> "The record establishes that the maintenance by each individual carrier of less favorable transit arrangements at the midwestern markets than those maintained at the country markets results in undue prejudice to the midwestern markets and in undue preference of the country markets. No order for the future will be entered, but defendants will be expected to remove the undue prejudice and preference

found to exist at such country markets as Morris, Prospect, Valley, Fremont, Lincoln, and any others of the same character, whether operated by the carriers themselves or independently. If defendants do not, within a reasonable time, meet this expectation, complainants may, by petition, call the matter to our attention, giving information therein as to the specific points involved, when such further action will be taken as may then seem proper."

It is perfectly obvious that the Kansas City, Omaha and other large live stock markets possessed many advantages not existing at country points. The Commission did not seize upon these advantages to say that they justified a difference in transit practices. Instead, it ruled that despite such advantages it constituted undue discrimination to permit the country markets to transit on a more favorable basis than the large midwestern markets.

In *Strasburg Steam Mills* v. *Southern Railway Co.*, 53 I. C. C. 52, Strasburg, Virginia, filed a complaint alleging that the defendant railways discriminated against it in favor of Lanville and Lynchburg, Virginia, on shipments of wheat and grain products. Under the situation complained of, wheat could be shipped from Chicago, Illinois, over the Baltimore & Ohio through Strasburg to Lynchburg, milled there and the product shipped thence to Raleigh, North Carolina, at a rate of 13.8 cents to Lynchburg and a proportional rate of 15 cents beyond. On similar shipments milled at Strasburg, a rate of 13.8 cents applied to Strasburg and a local rate of 26 cents beyond, thus placing the complainant at a disadvantage of 11 cents per cwt. The defendants claimed that the basing rates from Lynchburg had been reduced and that for that reason it became necessary in order to preserve the business of mills at that point to permit milling in transit on the lower basis; that otherwise these mills could not have continued in operation as against shipments of milled products from mills located in the Central Freight Association territory. The Commission held that the de-

fendants' rates and regulations were unduly prejudicial to the extent that they resulted in higher total charges for Strasburg than those applicable to the transportation of similar shipments milled in transit at Lynchburg or Danville. It was stated (l. c. 56, 57):

> "With respect to the proposal of the defendants to assess a switching charge of $2 in addition to the through rate on shipments milled at Strasburg, it is sufficient to state that the service performed in the movement from Strasburg Junction to Strasburg is precisely the same whether the grain is shipped through Strasburg or is stopped in transit at complainant's mill, and there is therefore no justification for thus discriminating against Strasburg as compared with other points on the direct through route. On behalf of the Baltimore & Ohio it is stated that with a few exceptions a charge of 0.5 of a cent for milling in transit applies at all stations on that line, and contended that such a charge should also apply at Winchester and Charlestown. We have frequently held that a charge not exceeding 0.5 of a cent is reasonable for this additional service. But we have also condemned the discrimination which results from the collection of such a charge at one milling point while no charge is made at other milling points on the through route, including rate-breaking points where the rates to or from the latter points are essentially parts of the through rates. *Southern Illinois Millers Asso.* v. *L. & N. R. R. Co.*, 23 I. C. C. 672, 677.
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> * * * * * * *
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> "We find that defendants' rates and regulations applied to the transportation of wheat in carloads from points in and west of central freight association territory and from points in Pennsylvania, Maryland, Virginia, and West Virginia, milled in transit at Charlestown, Winchester, or Strasburg, and forwarded from the milling points as products of wheat to destinations in Carolina territory are, and for the future will be, unduly prejudicial to the extent that they result or may result in higher total charges than those applicable under the rates and regulations contemporaneously applied by defendants to the trans-

portation of similar shipments moving through Charlestown, Winchester and Strasburg and milled in transit at Lynchburg or Danville."

In *Rodney Milling Co.* v. *Missouri Pacific R. Co.*, 93 I. C. C. 200, flour and feed mills at Kansas City, Missouri, filed a complaint alleging that the rates charged on wheat shipped from stations in Kansas to Atchison, Leavenworth, and St. Joseph were unreasonable for the reason that such shipments could be milled in transit at points West of Kansas City and then shipped through Kansas City to Atchison and other destinations on the local rate, while the complainants at Kansas City were forced to pay higher rates than their competitors if transit was taken at Kansas City. The Commission upheld the complaint, saying that:

> "No reason appears why higher rates should be assessed from and to the points here under consideration on shipments milled at Kansas City than on shipments moving over the same route which have been milled at competitive stations west of Kansas City or on shipments milled at Kansas City and thence shipped to points in Missouri, Minnesota, and Iowa.
>
> "We find that the rates herein found applicable were, are, and for the future will be, unreasonable and unduly prejudicial to the extent that they exceeded, exceed, or may exceed the contemporaneous through rates from the points named to the same ultimate destinations, upon which milling in transit is allowed at points in Kansas west of Kansas City, Missouri-Kansas; that complainants made the shipments as described and paid and bore the charges thereon; that they have been damaged in the amount of the difference between the charges paid and those which would have accrued on the basis herein found reasonable; and that they are entitled to reparation, with interest."

And in *American Grain & Hay Co.* v. *Illinois Central R. Co.*, 129 I. C. C. 225, it was held that the failure of

the defendants to maintain the same through rates on grain via Memphis with transit as they maintained via East St. Louis from points in Iowa, Illinois, Minnesota and Wisconsin to destinations in Arkansas resulted in undue prejudice to Memphis and undue preference to their competitors at East St. Louis.

In *Santa Rosa Traffic Association* v. *Southern Pacific Co., supra,* the Commission ruled that the fact that one point is on a branch-line and another on a main-line does not constitute such dissimilarity as to justify lower terminal rates to one which are denied to the other.

The fact that a market is advantageously located with reference to the lines of many carriers does not constitute a dissimilarity justifying a difference in treatment. *Ridge Coal Mining Co.* v. *Mo. Pac. R. Co.*, 62 I. C. C. 259; *Dering Mines Co.* v. *Director General*, 62 I. C. C. 265; *Bell & Zoller Coal Co.* v. *Baltimore & O. S. W. R. Co.*, 74 I. C. C. 433, reversing *Fairmount & Cleveland Coal Co.* v. *Baltimore & Ohio R. Co.*, 62 I. C. C. 269, order sustained, *United States* v. *New River Co.*, 265 U. S. 533, 68 L. Ed. 1165, 44 S. Ct. Rep. 610, reversing *New River Co.* v. *Chesapeake & Ohio Ry. Co.*, 293 Fed. 460; *Winding Gulf Colliery Co.* v. *Chesapeake & O. Ry Co.*, 115 I. C. C. 113; *Ragland Coal Co.* v. *Virginian Ry. Co.*, 115 I. C. C. 147.

3. Even if any advantage exists because the primary markets have the rate-break or because of any other factors, this is no lawful basis for creating a discriminatory prejudicial adjustment for the purpose of offsetting the alleged advantages, as it is the function and purpose of Sections 1 (5), 2 and 3 (1) of the Interstate Commerce Act to uproot all discriminations rather than to create discrimination for the purpose of offsetting advantages of other points.

The fundamental purpose of the Interstate Commerce Act is "to compel the carrier as a public agent to give equal treatment to all," "to cut up by the roots every form

of discrimination, favoritism and inequality" and to "place all shippers upon equal terms." *New York, N. H. & H. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361, 392; *Louisville & N. R. Co.* v. *Mottley*, 219 U. S. 467, 478; *U. S.* v. *Union Stock Yards & Transit Co. of Chicago*, 226 U. S. 286.

This court in its recent decision in *Mitchell* v. *U. S.*, 85 L. Ed. Adv. 811, said (l. c. 815):

> "We have repeatedly said that it is apparent from the legislative history of the Act that not only was the evil of discrimination the principal thing aimed at, but that there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach. *Shreveport Case* (*Houston, E. & W. T. R. Co.* v. *United States*), 234 U. S. 342, 356, 58 L. Ed. 1341, 1350, 34 S. Ct. 833; *Louisville & N. R. Co.* v. *United States*, 282 U. S. 740, 749, 750, 75 L. Ed. 672, 679, 680, 51 S. Ct. 297; *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 512, 513, 75 L. Ed. 1227, 1237, 1238, 51 S. Ct. 505."

It is well established that one discrimination or prejudicial adjustment cannot be justified by the alleged existence of another. Watkins, Shippers & Carriers, 4th Ed., Par. 144, page 283; *Railroad Commission of Louisiana* v. *Arkansas Terminal Ry. Co.*, 41 I. C. C. 83; *Freight Bureau* v. *Cincinnati, N. O. & T. P. Ry. Co.*, 7 I. C. C. 180; *Colorado Coal Traffic Assn.* v. *Colo. & S. Ry. Co.*, 18 I. C. C. 572; *Sioux City Commercial Club* v. *C. & N. W. Ry. Co.*, 22 I. C. C. 110; *Sheboygan Assn.* v. *Chicago & N. W. Ry. Co.*, 55 I. C. C. 140; *St. Louis Chamber of Commerce* v. *Director General*, 59 I. C. C. 586; *Mo. River-Nebraska Cases*, 40 I. C. C. 201.

In *Railroad Commission of Louisiana* v. *Arkansas Terminal Railway Co.*, *supra*, there was a disparity between rates from Shreveport to destinations in Texas, as compared with rates from Texas points to the same destinations

for like distances. Commodity rates from Texas points to Shreveport were materially higher than rates from such points to other Texas points for like distances. In an attempt to justify these differences in rates, the interveners and defendants contended that the inbound rates to Shreveport from producing territories were more favorable than the inbound rates to Texas points. It was contended that since Shreveport had an advantage on the inbound rates higher rates against Shreveport on outbound movements could not be unlawful. In rejecting this contention, the Commission held that it could not equalize the commercial advantages of Shreveport and that in addition it could not justify prejudicial outbound rates by advantages possessed as to inbound rates. The Commission said:

> "It is not the function of a railroad to equalize the commercial advantages of cities. If Shreveport is so situated by reason of her position on the Red River and her proximity to the Mississippi that the railroads serving her are justified in extending to her inbound rates which are lower than those extended to Dallas and other cities in Texas, this is her advantage of which she may take full benefit. The carriers may not say that they will absorb in the outbound rates such advantages as Shreveport has on her inbound rates.
>
> "The proposition that Shreveport has a right to claim the same treatment with respect to rates to and from Texas as is accorded to towns in Texas 25, 50 or 100 miles West of Shreveport, distance and respective transportation conditions considered, regardless of the inbound rates, is so self-evident as to require no discussion. We are dealing here with outbound rates and the reasonableness of such rates does not in anywise depend upon whether the articles taking those rates were produced at the points of shipment or came to those points by wagon, boat, railroad or otherwise.
>
> "The uncontradicted evidence is that no transportation conditions exist which justify rates between Shreveport and points in Texas higher than

those contemporaneously applied for like distances within Texas."

In *Freight Bureau* v. *Cincinnati, N. O. & T. P. Ry. Co.*, 7 I. C. C. 180, the Commission held that merely because a city enjoys exceptional advantages in one respect is no reason why it should be subjected to discrimination in other respects. Here the carriers sought to justify an adjustment prejudicial to Cincinnati by saying that Cincinnati obtained a better freight rate from points of origin than did Louisville and that therefore it ought to pay a higher rate upon those articles when they went forward for distribution. The Commission rejected this contention saying (l. c. 189):

> "The fact that it (Cincinnati) enjoys exceptional advantages in one respect is no reason why it should be subjected to discrimination in some other respects."

Similarly, in *Colorado Coal Traffic Assn.* v. *Colorado & S. Ry. Co.*, 18 I. C. C. 572, the Commission held that the fact that one point has lower rates than the competing point to some destinations afforded no basis for a difference in treatment with reference to other rates.

The situation in *Sioux City Commercial Club* v. *C. & N. W. Ry. Co.*, 22 I. C. C. 110, was much like that in the instant case. There Minneapolis and St. Paul sought to justify more advantageous class rates over Sioux City because Sioux City enjoyed more liberal back-haul movements. The Commission held that this was no justification for an inequitable rate prejudicial to Sioux City.

The Commission has frequently held that carriers cannot by the allowance of back-hauls, out-of-line hauls, and other more favorable practices treat these as dissimilarities sufficient to justify other discriminations and differences in treatment. *Business Men's Assn. of Minn.* v. *Chicago, St. P. Ry. Co.*, 2 I. C. C. 52; *Rice et al.* v. *Western N. Y. C. Co.*, 4 I. C. C. 131; *Board of Trade of Chicago* v. *Chicago & A. R. Co.*, 4 I. C. C. 158; *Board of Trade of Hampton* v. *Nashville, C. & St. L. Ry. Co.*, 8 I. C. C. 503.

Moreover, subsequent to the opinions in 205 I. C. C. 341, R. 320-1, and 215 I. C. C. 91, R. 538-40, at the hearing on the formal complaints, the differences relied upon by the Commission were shown to be non-existent. At such hearings much undisputed evidence was introduced to show that a great amount of out-of-line service was allowed at interior transit points and that contrary to the general recitations in the Commission's earlier reports, interior points operate generally upon rates decidedly more circuitous than rate-break markets (See record in No. 27628 pp. 462, 1529, 1530, 1621, 1622).

It is significant that in view of the evidence heard on the formal complaints the Commission did not in any of its subsequent decisions mention or rely upon said alleged differences in limitations as to out-of-line movements and back-hauls referred to in its earlier reports.

The foregoing shows that if it be true that rate-break markets have the advantages found by the Commission, such advantages cannot be offset by allowing more favorable transit privileges to interior points. The opinions of the Commission show that the mechanics of transit are the same in both cases; that the cost of the transportation and the transit service is the same at interior points, as at primary markets, and that if there is any difference it lies simply in the fact that the rate-break markets possess natural advantages of location and facilities which are not the basis for imposing higher transit charges.

III.

The Grounds Upon Which the Commission Refused to Grant Complainants Any Relief From the Discrimination Against Them and Against the Primary Markets, and Denied Their Complaints Are Insufficient As a Matter of Law to Constitute a Lawful Basis or Justification for Such Orders.

The preceding point was directed at the reasons relied upon by the Commission as the basis for treating pri-

mary and interior markets differently. This point is directed at the grounds upon which the Commission based its orders wherein it denied relief to appellants. The principal reasons for denying relief to appellants were as follows:

1. That to grant such relief would disturb and disrupt the rate-break structure (229 I. C. C. 15, R. 643).

2. That to grant such relief would reestablish the dual system of rates (231 I. C. C. 795, R. 650).

3. That to grant such relief would be to impose an additional burden upon and reduce the revenue of the carriers (229 I. C. C. 15, R. 643).

4. That the rate-break markets and interior transit points are merely accorded the benefit of their respective forms of transit and that the cancellation of transit at points other than rate-break markets would unduly prejudice such points and unduly prefer other interior transit points on other routes (229 I. C. C. 16, R. 644).

Under the preceding point, we have shown that the Commission did not find any differences in the transit service or the cost thereof. We have further shown that in attempting to justify its denial of relief, the Commission was in fact offsetting the natural advantages possessed by the primary markets. Also in doing so, its action was in direct conflict with all its previous decisions and with the decisions of the courts.

In this situation, and although the Commission has held that "a modification on the basis suggested would have to rest upon a *substantial* difference in conditions affecting the interior transit points and the rate-break markets," 215 I. C. C. 90 (R. 538), it sought to justify its orders by resort to the meaningless fiction of a difference in the forms of transit (See point 4 above). How could there be any difference in the forms of transit when, as the Commission recognized the purpose of the transit arrangement, the physical operations and every incident of

the transaction are exactly the same? 215 I. C. C. 90 (R. 538). The end to be achieved in either instance is the forwarding from the transit point on a basis of rates, so that the through rate from the point of origin of the grain to the destination will be protected. Exactly the same records are kept for the transit operation at a rate-break market as at a competing interior point, the same evidence of prior shipment is required, the same character of billing is involved and every other detail is exactly the same. There is in fact no difference whatever to be discerned between transit at a rate-break market and transit at an interior point, except only this that the proportional rate applied from a rate-break market which is in truth and in fact the balance of a through rate is a fixed and constant amount. This obviously shows no difference in the forms of transit and, as heretofore pointed out, the Commission was in fact relying upon the alleged advantages of primary markets over the interior points, rather than upon any difference in the form or nature of the transit service and, as we have also seen, any advantages which the primary markets may possess constitute no lawful basis for the imposition of higher charges against shippers at primary markets for the same transit service.

The other three reasons for denying relief are equally insufficient to support the Commission's orders for the following reasons:

(a) The Commission's position that the relief sought should be denied because to allow it would disturb and disrupt the rate structure, reestablish the dual system and impose an additional burden upon the carriers is insufficient in law and in fact.

Appellants contend that the action of the Commission in denying them relief on the grounds that permitting the primary markets to transit on a limited number of through rates would disrupt the rate structure and affect the revenue of the carriers was erroneous and legally unjustifiable for the following reasons:

1. It is no basis for denying relief from a substantial discrimination that to grant such relief will disturb the rate structure or affect the revenue of the carriers.

The Commission's refusal to order a discontinuance of the preference on the ground that to do so would disturb the rate structure is obviously legally insufficient. It is no legal basis for denying such relief that to grant it would disturb or disrupt the rate structure, and an order based in whole or in part upon such grounds is erroneous. The Supreme Court, in *United States* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 294 U. S. 499, 79 L. Ed. 1023, held that the Commission may not annul a reduction of rates because if put into effect it would disrupt the existing rate structure. In that case the Commisssion found as follows:

> " 'We find that the proposed rates, if permitted to become effective, would lead to a disruption of the rate structure on coal in the Indiana and related areas, thus impairing the revenue of the carriers serving those areas and their ability to provide the adequate and efficient transportation service contemplated by Sec. 15a of the act; that they would cause a disruption of the individual groups from which the rates are proposed; and that they would cause a disruption of the long-standing rate relation existing for competitive purposes, between the several Indiana groups.
>
> " 'We find that the proposed rates would be unreasonable and in violation of Sec. 1 (5) (which denounces unreasonable charges) and 15a (2) of the act (which has been summarized above).' "

Note that the above findings are almost the same as in this case. See 229 I. C. C. 16, R. 644.

The Supreme Court held that these findings were insufficient and said, 294 U. S. l. c. 507:

> "The statement in the second of these paragraphs that the proposed rates would be 'unreasonable' must be read in the light of the report as a whole, and

then appears as a conclusion insufficient as a finding unless supported by facts more particularly stated. *Cf. Florida* v. *United States, supra* (282 U. S. 213, 75 L. Ed. 303, 51 S. Ct. 119); *Southern P. Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, 449, 55 L. Ed. 283, 31 S. Ct. 298. There is no suggestion in the report that the rates have been so reduced as to be less than compensatory. True they do not reach the maxima beyond which charges are excessive. On the other hand, they do not pass the minima beyond which charges are too low. A zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself. *Texas & P. R. Co.* v. *United States*, 289 U. S. 627, 636, 77 L. Ed. 1410, 1421, 53 S. Ct. 768; *United States* v. *Illinois C. R. Co.*, 283 U. S. 515, 522, 68 L. Ed. 417, 424, 44 S. Ct. 189. We lay to one side cases of discrimination or preference or rivalry so keen as to be a menace to the steady and efficient service called for by the statute. Interstate Commerce Act, Sec. 15a, U. S. C., Title 49, Sec. 15. Those tendencies excluded, 'a carrier is entitled to initiate rates and, in this connection, to adopt such policy of rate making as to it seems best.' *United States* v. *Illinois C. R. Co., supra.*

"Subject to these tests, the finding by the Commission that the new rates are unreasonable is seen to be nothing more than a deduction from the paragraph immediately preceding, wherein we learn that the schedule, if put into effect, will disrupt the rate structure in Indiana and related areas and disturb groupings and differentials maintained for many years. This brings us to the question whether such disruption and disturbance may be deemed a sufficient reason for taking from a carrier the privilege of reaching out for a larger share of the business of transportation and initiating its own schedule to help it in the struggle. For an answer to that question, other facts, exhibited with greater particularity in other parts of the report, must be brought forward and considered. Those affecting the Indiana groups may conveniently be stated first; those affecting groups in Illinois afterwards.

"Every change of a rate schedule, either voluntary or involuntary, is a disruption *pro tanto* of the

rate structure theretofore prevailing. Plainly such a disruption without more is no sufficient reason for prohibiting a change. The Indiana carriers by long continued cooperation have maintained a fixed schedule of differentials between mines in the southern group (Princeton and Booneville) and mines farther to the north. There is not a fact stated in the report to indicate that it will be unjust or impracticable to apply the new Milwaukee rates to the other lines in Indiana after increasing them by the differentials hitherto prevailing. There is not a fact to indicate that the rates so reduced will be less than compensatory or that capacity for service to the public will be impaired or put in jeopardy. 'The raising of rates does not necessarily increase revenue. It may in particular localities reduce revenue instead of increasing it, by discouraging patronage.' *Florida* v. *United States, supra* (282 U. S. 214, 75 L. Ed. 304, 51 S. Ct. 119). As applied to the Indiana groups, the broad conclusions of the report, when related to the supporting findings, amount to this and nothing more, that the new schedule for Milwaukee is likely to be followed by new schedules maintaining the same ratio for other lines in Indiana. Even if the outcome for those lines is a diminution of the profits (the return being none the less compensatory), this without more does not make it wrongful for Milwaukee to restore the long standing parity between Brazil and Springfield. At the very least the findings should inform us, if only approximately, of the extent of the expected loss; they should make it clear whether the impairment of revenues will be trivial or substantial, for only thus can the impairment be related to capacity for service. *Cf. Florida* v. *United States*, 292 U. S. 1, 9, 78 L. Ed. 1077, 1084, 54 S. Ct. 603. Nothing of the kind is shown."

* * * * * * *

(l. c. 509):

"We are warned by the new report, however, that a change once permitted has a tendency to spread. The acceptance of the new schedule for Milwaukee will lead, it is said, to requests for proportionate reductions by other lines in Indiana, and this in turn

to new reductions by lines in Illinois and even in Kentucky, the outcome being characterized in the argument of counsel, though not in the report, as a rate war between the roads. The threat of such a war may be a reason for rejecting a new schedule if the rate relation previously existing is a fair one, or even, we may assume, if the Commission is without power to avert the reprisals and thereby nullify the threat. Neither of these conditions is satisfied in this case. The Commission does not hold that the existing rate relation is intrinsically sound and fair. On the contrary, it expressly concedes that the rate situation as between the Illinois and Indiana groups may be in need of correction, though it expresses the belief that this should not be done in any piecemeal fashion. The point of the decision is not that present rates are sound, but that they must be maintained, even if unsound, for fear of a rate war which might spread beyond control. The danger is illusory. The whole situation is subject to the power of the Commission, which may keep the changes within bounds.

* * * * * * *

"In brief a schedule of lowered tariffs has been canceled though the facts that control the validity of the reduction have yet to be determined. This was not a full discharge by the Commission of an immediate responsibility. It was inaction and postponement. Responsibility was shifted from the shoulders of the present to the shoulders of the days to come.

"We would not be understood as saying that there do not lurk in this report phrases or sentences suggestive of a different meaning. One gains at places the impression that the Commission looked upon the proposed reduction as something more than a disruptive tendency; that if found unfairness in the old relation of parity between Brazil and Springfield; and that the new schedule in its judgment would confirm Milwaukee in the enjoyment of an undue proportion of the traffic. The difficulty is that it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional

findings of an administrative agency. *Beaumont, S. L. & W. R. Co.* v. *United States,* 282 U. S. 74, 86, 75 L. Ed. 221, 229, 51 S. Ct. 1; *Florida* v. *United States,* 282 U. S. 194, 215, 75 L. Ed. 291, 304, 51 S. Ct. 119. We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

The foregoing holding is directly applicable to the instant case. Here, as in the foregoing case, the basis for the orders is the desire to protect a rate structure.

The Commission, as well as the courts, has frequently held that the fact that a disruption or break-down of a rate structure may result is no basis for denying the same privileges to different points or shippers where the transportation service is the same. *Jobbers & Mfg. Bureau* v. *Chesapeake & Ohio Ry. Co.,* 46 I. C. C. 432; *Middlesboro Board of Trade* v. *Louisville & N. R. Co.,* 27 I. C. C. 14; *Kloeber* v. *Northern Pac. Ry. Co.,* 96 I. C. C. 437; *Indianapolis Freight Bureau* v. *Cleveland Ry. Co.,* 26 I. C. C. 53; *Empire Steel & Iron Co.* v. *Director General,* 62 I. C. C. 157.

In *Jobbers & Manufacturers Bureau* v. *Cheasapeake & Ohio Railway Co., supra,* it was held that the fact that the establishment of certain rates may result in a far-reaching disruption of a highly important and complicated rate structure does not justify approval of rates which are discriminatory. The Commission said (l. c. 436):

"Defendants urge that the principle involved is far more important than the rates from Huntington and that a favorable response to complainant's contentions would result in a far-reaching disruption of a highly important and complicated rate structure. While in the view we take of the case the apprehended consequences are to be doubted, it is also to be said, as we have more than once held, that in any event such consequences would not justify an approval of rates which contravene the act."

Similarly the Commission has held in many cases that the maintenance of the revenue of carriers is not a factor to be taken into consideration for the purpose of justifying different rates to different shippers where the transportation service and the cost thereof is the same or substantially so. *Board of Trade of Troy* v. *Ala. Midland Ry. Co.*, 6 I. C. C. 1; *Beatrice Creamery Co.* v. *Ill. Central R. Co.*, 15 I. C. C. 109; *Hilton Lumber Co.* v. *Wilmington & W. R. Co.*, 9 I. C. C. 17.

2. If the Commission grants the relief sought it has the power to keep the situation under control so that the unrestricted dual system is not re-established and the rate structure not unduly affected.

Prior to July 1, 1935, many through rates had been established less than the combinations. This resulted in many variable transit balances. Although the markets functioned under this system, it was generally conceded that the existence of an unlimited number of variable transit balances was not as satisfactory as when the bulk of rates is on the combination. This system, referred to for the first time in the Grain Case as the "dual system," came in for criticism only because so many through rates had been established on the basis of less than market combinations. In the Grain Case, the Commission attempted to remedy the situation by embarking upon the experiment of making the combinations the exclusive basis for transit at the designated terminal points. This was the first time such a practice was ever tried. The Commission said that it was necessary in order to eliminate discrimination existing between different dealers in the same market. This position is obviously unsound for the reason that the privilege of using transit balances was available to any and all dealers in a given market indiscriminately.

It is not our purpose to defend or seek to reestablish the unrestricted dual system as it existed at the time of the first Grain Case. If this court concludes that the

orders of the Commission should be set aside, it is not for the Court to establish rates and practices. That is a matter for the Commission and it will be presumed that the Commission will not attempt to remedy present unlawful practices by creating any other unlawful or objectionable situation. It is our purpose, however, to point out that the flat assertion of the Commission that it should not grant the Complainants relief because to do so would reestablish the dual system is a conclusion unsupported by facts, and unsound. That the Commission's conclusion or assumption is not justified by the facts is apparent from a consideration of the Commission's reports.

In the first place it must be admitted, and the Commission recognized, that a minor number of balances is not objectionable. In the original Grain Case at the time of the establishment of the combinations as the exclusive basis for transit at rate-break markets, it was recognized that exceptions and adjustments would have to be made to meet demonstrated difficulties and to overcome prejudicial features (164 I. C. C. l. c. 698, R. 106; 223 I. C. C. l. c. 245, R. 625).

The Commission has allowed departures from the rate-break in numerous instances. Exceptions from the application of the absolute rate-break were allowed as to Southeastern territory, including Cairo and Memphis and St. Louis, all of which are rate-break markets (205 I. C. C. 392, R. 390-1). In 215 I. C. C. 83 (l. c. 95, R. 543), the Commission approved the cancellation of proportional rates between Chicago, Peoria and St. Louis, and from Memphis to points in Arkansas, for the purpose of permitting these markets to transit on through rates less than the combinations. In *Wheat Products From Twin Cities to Chicago*, 218 I. C. C. 27, the Commission permitted transit at the rate-break market of Minneapolis under the proportional rate from Duluth to Chicago and thereby equalized Minneapolis with the interior transit points through that market. In *Southwestern Millers League*, decided

July 12, 1938, the Commission had under consideration rates from the west into central freight territory and approved proportional rates from the rate-break markets of Milwaukee, Chicago, Peoria and St. Louis without fixing any limitation of transit. In *Transit Grain in St. Louis District*, 223 I. C. C. 556, the Commission refused to withdraw transit in the St. Louis District because it would "be unjustly prejudicial to that district and unduly preferential of interior Illinois and Missouri points where transit would still be available."

The significance of these exceptions is that they show that the Commission can and does control each situation, so that the unrestricted dual system or any of the so-called objectionable features of such system are not permitted to exist. Since the Commission controls each rate and every factor thereof, it is apparent that the whole situation is completely within the control of the Commission and any objectionable developments can be curbed or eliminated.

The same situation was presented in *United States* v. *Chicago, M., St. P. & R. R. Co.*, 294 U. S. 499, 79 L. Ed. 1023, where the Supreme Court said, 294 U. S. 1. c. 509:

> "The danger is illusory. The whole situation is subject to the power of the Commission, which may keep the changes within bounds."

When the Complainants appealed to the Commission for relief, the Commission at first sustained their position and found that its previous orders should be modified so as to authorize restricted departures from the exclusive application of proportional rates at rate-break points. In that report, the Commission found that the granting of the relief sought would not change a single rate in effect, but would merely permit the terminal markets to transit on an equality with interior transit operators on the same rates over the same routes (223 I. C. C. 239, R. 618). It further found that the granting of this relief would not

adversely affect the rate structure (223 I. C. C. 239, 244, R. 618, 624). Although the Commission subsequently denied a mandatory order, the above findings clearly indicate that the situation is one which would be within the control of the Commission and that it has full power to keep the changes within proper bounds.

IV.

The Opinion of the Commissioner Who Conducted the Grain Rate Investigation and of Other Commissioners That the Present Rate and Transit Adjustment Is Unduly Prejudical to the Primary Markets and Should Be Corrected Are Entitled to Great Weight.

The proceeding out of which the matter here in controversy arose was one of tremendous proportions. As the Commission said in the original report, "it embraces threescore and more of major issues, affecting every part of a vast territorial domain, each of which would ordinarily present a case of more than average importance and be treated in a separate report in the customary way." (164 I. C. C. 619, 697, R. 105).

The Commission recognized that in so comprehensive an investigation it would be impossible to arrive at conclusions in all respects which would be final, but that it would be necessary to modify its decisions and orders as experience demonstrated the need therefor. It said that "it would be impossible to take any comprehensive action without adversely affecting certain of the conflicting interests upon the record. Nothing but experience can demonstrate what the effect will be regarding certain of these issues." It therefore requested all parties "to make careful note of the effect upon their interests, with the view to bringing to our attention from time to time, after reasonable trial, those situations which may require further consideration" (164 I. C. C. 698, R. 106).

The grain and milling interests in the primary markets soon found, as appeared evident from the begin-

ning, that they could not compete with grain and milling interests at interior points when they had to pay the higher rate-break combinations in order to transit, while their interior competitors in many important instances could transit on lower through rates. They therefore went back to the Commission, in response to the invitation extended in the manner above indicated, and requested that they be permitted to transit on the same basis as the grain and milling interests at interior points.

The entire *Grain Rate Investigation* in which hearings, which extended over a number of years, were held throughout the territory from Chicago to the Pacific Coast was in charge of former Commissioner Meyer. In cooperation with two Examiners, he conducted this investigation, recommended the findings and conclusions based on the evidence and generally assumed the responsibility for the outcome.

It goes without saying, therefore, that Commissioner Meyer had an intimate knowledge of all of the questions involved in this proceeding and was better able to judge the effect of any action than other members of the Commission who had not been so closely identified with it, and it is safe to say that they deferred to his judgment in large part in arriving at the conclusions that were reached.

In view of these facts, the opinion of Commissioner Meyer upon any question involved in the proceeding should be entitled to great weight, and the record shows that when the question here involved was presented to the Commission on formal complaint, after its order had been in effect for some time, he immediately realized that a mistake had been made and strongly favored its correction. While the first report rendered in the formal complaint cases does not purport to be that of Commissioner Meyer, but of the Commission, there can be no question but what it bears the impress of his knowledge and experience in the matter (223 I. C. C. 235, R. 613).

As heretofore stated, in that decision the Commission authorized the carriers to establish transit at the primary markets on the lower through or overhead rates on which interior points are permitted to transit, but the carriers failed or refused to voluntarily establish the same. Complainants therefore petitioned the Commission for a mandatory order based on the record as previously made, which a majority of the Commission refused to grant (229 I. C. C. 9) (R. 635).

In a dissenting opinion to that report, Commissioner Meyer quoted the statement in the original report to the effect that the *Grain Case* constituted a very comprehensive investigation in which it was impossible to satisfactorily dispose of all questions, and in which the parties were invited to bring to the Commission's attention any situations requiring further consideration.

He pointed out that in a number of instances modification of the grain rate structure had already been made and, with reference to the request of complainants that they be granted transit on the same basis as interior points, he said:

> "In my opinion the complaining millers and markets have a just grievance against the present lack of transit at the rate-break markets on these rates and I should be glad to assume my share of the responsibility to permit of transit" (*Id.* 17) (R. 644).

In this he was joined by Commissioner Caskie (*id.* 18) (R. 646).

Thereafter complainants again pressed the Commission for relief and in a report rendered upon reargument, in which relief was denied, Commissioner Meyer again dissented, for the reasons stated in his dissent above mentioned (231 I. C. C. 793, 797) (R. 649, 653).

From this report, Commissioner Aitchison, who had not participated in the previous report, also dissented and

was joined by Chairman Caskie in an opinion which so emphatically and pointedly shows that the majority was in error that we shall here set it out in its entirety (*id.* 797-8) (R. 653-4):

"I concur in the separate expression of Commissioner Meyer, which reiterates the substance of his dissent in *Grain Case Modifications*, 229 I. C. C. 9, 17. However, I am of the opinion that *complainants in this proceeding have established that the present adjustment is unduly prejudicial to them.*

"In affirming the previous finding that dealers and millers at the Missouri River markets and Minneapolis are not unduly prejudiced by the denial of transit on the intermarket proportional rates, both the report now adopted and the previous report unduly emphasized the form of rate construction and the character of certain incidents of the transit involved, that is, whether under overhead rates or on inbound and outbound proportionals. The result is that *the substance of the material disparity which exists is subordinated to and is excused by tariff nomenclature.*

"The present adjustment denies transit at these rate-break markets on indirect routes, while the adjustment permits transit, and the privilege is accorded, at adjacent and competing points on either side on the same or more circuitous routes. This appears to be a violation of section 3 (1) of the act, regardless of the method of computing the rates or the form which transit may assume. No justification is suggested for this difference in treatment, other than the mere manner of rate construction and tariff publication, which I cannot bring myself to believe constitute a dissimilarity in transportation circumstances and conditions.

"It does not justify the disparity to say that the rate-break markets have offsetting advantages which require us to condone or ignore otherwise unreasonable disadvantages those points are subjected to by the adjustment. *The intent of the act we administer is that all unjust preferences shall be rooted out, not that they be balanced against each other and per-*

mitted to continue. If there are advantages to certain rate-break markets inherent in the rate-break system, it is because the markets are located where they are and because they enjoy the service of many competing railways. These are advantages of their location, which it is not for us to attempt to equalize by condoning other substantial inequality in treatment of those points.

"The situation should be corrected, even though it may require disturbance of the existing adjustment and of the manner of rate construction and statement. But I am not convinced that such dire results would follow as seem to be anticipated" (Emhasis in the foregoing quotations supplied).

In view of Commissioner Meyer's close connection with this case and his detailed knowledge of the grain rate structure generally and the particular question here involved, as well as the concise and logical expressions of Commissioner Aitchison showing that the primary markets are unduly prejudiced, the opinions of these Commissioners are entitled to the most careful consideration in determining whether the findings and conclusions of the majority are erroneous.

This Court has held that it is proper in determining the basis of an order of the Commission and its validity to consider the dissenting opinions. *Southern Pacific Co. v. U. S.*, 219 U. S. 443, 449; *St. Louis & O'Fallon Ry. Co. v. U. S.*, 279 U. S. 461, 485-6.

V.

The Lower Court Erred in Sustaining the Majority Opinion of the Commission.

The opinion of the lower court shows that it entirely overlooked or ignored the fundamental issue here involved, viz., that there is no difference in the cost of service justifying a difference in rates, and also shows a number of important misconceptions which contributed to the erroneous result reached by the court (R. 737-755).

Lower Court Gave No Consideration to the Fact That There Is No Difference in the Service or the Cost Thereof.

The most significant thing about the court's Opinion is that it makes no reference whatever to our primary contention that, since there is no difference in the cost of service as between transit at the primary markets and interior points, the orders of the Commission are void because they create discrimination and prejudicie in violation of the express provisions of the Act.

This is the fundamental issue in this case and the failure of the court to take it into consideration has led to erroneous conclusions.

The Commission did not find that there is any difference in the transportation service or the cost thereof at primary markets and interior points which alone would justify a difference in rates or transit privileges. On the contrary, the Commission found that the transportation service and the mechanics of transit are the same on the through rates as on the rate-break combinations, and it is obvious therefore that there is no difference in the cost thereof as between primary markets and interior points. This is the controlling fact and calls for a conclusion directly contrary to that reached by the majority of the Commission and sustained by the lower court in utter disregard thereof.

Instead of passing upon this point, the court refers to the reasons given by the Commission for requiring the exclusive use of the rate-break combinations and treats these as findings of ultimate facts, when at best they are merely incidental to the main issue and do not justify correcting a situation which the Commission deems improper in an unlawful manner—by creating discrimination and prejudice against the primary markets expressly prohibited by the Act.

Lower Court Erroneously Assumed That There Are Two Methods of Transit.

Throughout the opinion, the lower court refers to *two methods* of transit (R. 739, 740, 749), which is erro-

neous and misleading. The method of transit is exactly the same, whether it takes place at rate-break or interior points, or on the combinations or the through rates. The only difference is in the form or the construction of the rates, one being the combination of separately established factors and the other being one-factor through rates.

Lower Court Erroneously Assumed That Interior Points Can Transit Only on Through Rates.

The lower court erroneously assumed that interior points could transit only on the through rates, when the fact is that they can transit on the combinations as well as the through rates, whereas the primary markets are permitted to transit only on the combinations.

That the court thought interior points could transit only on the through rates is indicated by the following:

1. The opinion states (R. 741), referring to the fact that the Commission originally prohibited transit at interior points on lower rates through rate-break points, that the effect of this "had been to deprive those points of any substantial transit privileges * * *." But such points could transit on the rate-break combinations the same as the primary markets, which now are only permitted to transit on the combinations. If such interior points were then deprived of any substantial transit privileges the primary markets are now because they are still on the same basis as the interior points were then.

2. The court says (R. 742) that "the gravamen of the complaint is that the order of the Commission denying the primary markets the privilege of having both the transit privilege under the proportional rate and also under the through rate with transit is unreasonable, unfair, unjust and discriminatory."

Here the court again overlooked the fact that interior points have the privilege of transit under both classes of rates and that our contention is that, since they can transit on both, it is unreasonable, unfair, unjust and discriminatory because the primary markets are not permitted to do so. *This is the gravamen of the complaint.*

3. On Record page 749 it is stated that the Commission justified the discrimination depicted by the illustration there given by pointing out that "it was necessary to avoid unfairness to interior points such as Independence to make available to them one or the other of the two methods of transit."

By this the court means transit on the combinations of rates or on the through rates. But as we have seen, interior points can transit on both, and if they were deprived of transit on the through rates, they could still transit on the combinations to which transit at the primary markets is now confined, and would therefore be on the same basis. However, we are not complaining because interior points can transit on both, but because primary markets cannot.

4. In the same paragraph (R. 749) the court said that interior points "must be permitted to transit on through rates or none at all." This is not correct. They transit on the combinations the same as the primary markets, the only difference being in the inbound and outbound factors which they pay. The total rate paid from origin to destination is exactly the same and as the Commission said in the report on further consideration in the Grain Case, interior transit points are interested only in an equality of through charge (205 I. C. C. 387, R. 376).

Opinion Erroneously States That Only Way of Correcting Situation Was by Abolishing Dual System.

The opinion of the lower court states in effect that the Commission found that there was no other way of correcting the situation than by abolishing the dual system. This is not correct. As stated in the opinion (R. 744), the Commission found that overhead rates through the primary markets less than the combinations should be cancelled, but made an exception where necessary to meet carrier competition, thus approving the dual system to that extent. It permitted interior points to continue to transit on the combinations and the lower rated exceptions thereto, and our complaint is based on the fact that the primary markets are not permitted to transit on the

exceptions, but are confined to transit on the combinations.

In other words, it is our contention that if exceptions (lower through rates) to the rate-break combinations are to be permitted and interior points are permitted to transit on the exceptions, then the primary markets are entitled to do likewise. The Commission has not abolished the dual system entirely. It has merely prohibited the primary markets from transiting on the lower through rates, while permitting interior points to do so.

Commission Did Not Find That to Transit on Both Rates Would Give Undue Preference to Primary Markets.

The Opinion of the lower court states that "the Commission found that the availability of both methods of transit to the primary markets resulted in undue and unfair discrimination in favor of the primary markets over intermediate interior points not possessing the proportional rates. * * *" (R. 740).

By this the court undoubtedly means that to permit the primary markets to transit on the combinations as well as the lower rates gives them an undue preference. The same idea is again expressed in the Opinion where it is stated that the Commission's findings in part are that the use of transit balances under through rates and the proportional rates out of the same rate-break markets—

> "(d) give an undue preference to those having the privilege of both transit balance and proportional rates" (R. 744).

The Commission made no such finding as referred to in the two statements just mentioned. What the Commission said at the place from which the last quotation is taken is that it did

> "give an undue preference to the users of transit balances over the users of proportional rates" (R. 311).

A comparison of the alleged finding quoted from the Court's opinion and that quoted from the Commission's report shows that there is a vast difference between the two in meaning and effect.

The Court said in effect that the use of transit balances and proportional rates out of the same rate-break markets gives an undue preference to those markets, while the Commission said in effect that it gives an undue preference to the users of transit balances over the users of proportional rates in the same market.

This is not a finding by the Commission, therefore, that to grant the primary markets the right to transit on both rates gives them a preference over interior points, as the Court evidently understood it. The fact is that the Commission nowhere made such a finding though the majority finally said, when pressed for relief by the primary markets, that the latter were not prejudiced by granting transit on the lower through rates at interior points.

The distinction here made is of great importance in the determination of this case. The lower court erroneously assumed that the Commission had found that there would be undue prejudice, if the primary markets were permitted to transit on both classes of rates, but as we have shown the Commission made no such finding, hence there is nothing from this standpoint to support its conclusion.

When the Commission said that to permit the primary markets to transit on both classes of rates would "give an undue preference to the users of transit balances over the users of proportional rates," it had reference to users or shippers in the same primary market. That is evident from the quotation itself, from paragraph 2 of the syllabus to 164 I. C. C. 619 (R. 27), and to page 645 of that Report where the finding was first made in the following language:

> "We find that the practice of contemporaneously charging both proportional rates and transit balances subjects the shipper under proportional rates to undue prejudice and disadvantage and gives to the shipper under the lower transit balances an undue preference and disadvantage" (R. 53).

That the Commission had reference only to shippers in the same primary market is indicated by the explanation on page 335 of the Report in 205 I. C. C. 301 as follows:

> "The advantage to the user of the transit balance over the user of the proportional rate is evident, and increases in the ratio of the increase in the storage capacity of the respective cash grain dealers at the rate-break markets" (R. 313).

This clearly shows that the finding related to prejudice as between dealers in the same market and as such it is clearly erroneous because all dealers in the same market would have the same opportunity to use transit balances or proportional rates. The fact that one shipper may do more business than another and thus be able to avail himself of more transit balances does not constitute prejudice any more than the fact that a large shipper may be able to ship in carloads at the lower rates on such shipments while another has to pay higher less than carload rates.

But while there is no discrimination and prejudice as between shippers located in the same market because they all have available the same rates, there is discrimination and prejudice against the primary markets when they are confined to transit on the rate-break combinations, while interior points are permitted to transit not only on the combinations, but the lower through rates. That is what the finding of the Commission here referred to inevitably means.

The fact is that it is more advantageous for a shipper to use the lower rates from which transit balances result,

whether he is located at a primary market or at an interior point, and the only way to bring about equality and avoid prejudice is to let all shippers, regardless of their location, transit on the lower through rates as well as the rate-break combinations.

Reasons Given by the Commission Do Not Justify Discrimination.

The opinion of the lower court sets forth the reasons which the Commission gave for abolishing the dual system and says that plaintiffs do not question the existence or sufficiency of evidence to support the factual conclusions (R. 745). That is not entirely correct. We took the position that the finding that there is prejudice within the primary markets is erroneous on the face of it, and that even though transit balances less than the proportional rates out of the primary markets should tend to disrupt the rate structure, depress the price of grain and reduce the revenues of the carriers, that does not justify correction in a manner which results in discrimination and prejudice against the primary markets. However, the lower court did not specifically address itself to this fundamental contention, which should have been regarded as determinative of this phase of the case.

Rate-Break Result of Natural Conditions.

Referring to our contention that the proportional rates result from natural conditions at the primary markets, the lower court concedes that the Commission may not "equalize unequal natural conditions," but says in effect that the proportional rates give to those markets all of the advantages to which they are entitled and that, if they were also permitted to transit on the through rates, that would give them an advantage not flowing from their geographical location, to the material disadvantage of other markets (R. 746-7).

That entirely misses the point we made. We contend that any advantage of proportional rates results from natural conditions and that this may not be offset by

giving interior points more favorable rates and transit privileges, but that is exactly what the court's reasoning leads to and means, and hence constitutes an attempt to "equalize unequal natural conditions." And if to place the primary markets on an equality with other markets results in disadvantage to the other markets, that does not give the latter any just cause of complaint.

Illustrations Not Complete.

The court illustrates the alleged disadvantages that would result to other markets as follows: A miller at Independence could buy grain at Dodge City, pay the local rate inbound and reship to Chicago for 16 cents, and a miller at Kansas City could do the same thing. If the latter were permitted to transit on the through rates, he could reship to Chicago at a transit balance of the through rate from Omaha to Chicago of approximately 10c (9 1/2c), "if, (as the Commission found is almost always the case) the Kansas City miller had moved a like quantity of grain from Omaha to Kansas City upon the proportional rate of 6 1/2 cents" (R. 747). (This assumes substitution of the inbound billing from Omaha for that from Dodge City, which is permissible.)

Instead of following the illustration to a conclusion, the court simply says that "the Kansas City miller would (thus) have a distinct advantage over the Independence miller which the Commission found was not insignificant in practice" (R. 747).

The part of the illustration omitted is that the Independence miller can now reship to Chicago on the transit balance of the through rate from Omaha to Chicago of 6 cents, if he has moved a like quantity of grain from Omaha to Independence on the local rate of 10 cents. (These being the rate factors on Independence, and assuming like substitutions of billing.)

Thus the Independence miller can now do exactly what the Kansas City miller could do if permitted to

transit on the through rates. Regard must be had to the through rate, and if transit were allowed at Kansas City, each would pay exactly the same through rate for the movement from Omaha to Chicago, namely 16 cents. *That would be equality!*

Under present conditions, the Kansas City miller in order to transit has to pay 22 1/2 cents for the movement from Omaha to Chicago, while the Independence miller pays only 16 cents. *That is inequality!*

Furthermore, the illustration as put by the court involves substitution of billing at Kansas City, and by failure to carry it to a conclusion implies that there could be no substitution at Independence, which is not correct. As the Commission said in 223 I. C. C. 235, 242, R. 622, "Selection of billing and the opportunity to substitute one grain for another is inherent in all transit and is not peculiar to rate-break markets."

Lower Court's Finding of Discrimination Against Primary Markets Conclusive.

Referring to our contention that it is unjust, unreasonable, discriminatory and prejudicial that a miller at Kansas City must pay 22 1/2 cents to transit Omaha grain to Chicago, while a miller at Independence shipping over the same line pays only 16 cents, the court says:

> "Undoubtedly, this situation discloses a discrimination at Kansas City. The same discrimination would apply to other primary markets using other similar illustrations" (R. 748).

This is a clear recognition of the correctness and validity of our contentions. But what becomes of it? Here is the language with which the court brushes it aside:

> "Fundamentally, the condition depicted may occur because of the existence of an unusual and unnatural through rate between Omaha and Chicago via Kansas City set up by carriers not having a direct

route between Omaha and Chicago in order that they may compete with the direct lines in the movement of grain between those points. Obviously, Kansas City shippers are not entitled because of their geographical location to ship grain from Omaha to Kansas City and thence to Chicago at the same rate as grain is carried from Omaha on a direct line to Chicago" (R. 748).

The Commission has approved the application of the rates over all of the routes from Omaha, including those via Kansas City and others more circuitous.

The Commission expressly authorized the through rates over routes via Kansas City to meet carrier competition, and provided that all points located thereon could transit on the through rates except Kansas City and other primary markets.

The Commission did not prohibit transit on the through rates at Kansas City because of the circuity of the routes. If it had, it would also have had to prohibit it at all other points on the route via Kansas City.

What are the through rates via Kansas City for, if not to enable the carriers having the indirect routes to compete for the traffic?

If Kansas City is not entitled to transit on the through rate from Omaha to Chicago because it is unusual and unnatural, why are Independence, St. Louis and numerous other points located on the same route entitled to transit on such a rate.

The purpose of the Interstate Commerce Act was "to cut up by the roots every form of discrimination, favoritism and inequality." Why is this form permitted?

The fact is that the through rates and routes via Kansas City are not unusual and unnatural. But if they are, what about the Omaha-St. Louis situation to which reference has heretofore been made, where the routes through Kansas City are almost the most direct, and the routes through Topeka and Lincoln, Davenport and Dubuque are extremely circuitous. Here the court would

have to say that the through rate of 14 cents applying over the latter is "unusual and unnatural," and yet Kansas City would have to pay a rate of 18 1/2 cents to transit on the direct route.

These facts show how erroneous and unsound the reasons are which the court gave for not holding that the discrimination which it said *undoubtedly exists* is unlawful and should be removed.

The discrimination which the court found against Kansas City cannot reasonably nor legally be explained away in that manner. So long as all other points except the primary markets are permitted to transit on the through rates, whether they be unusual and unnatural or not, and on all of the routes, whether they be direct or not, so long are the primary markets entitled to transit on the same rates and routes, and unless they are permitted to do so, unlawful discrimination undoubtedly exists.

Commission Did Not Find That Primary Markets Were Not Injured.

Finally, the lower court says that "the Commission found that the granting of the privilege of transit on through rates to interior intermediate points was of no substantial injury to the primary markets because of the insignificant opportunity of the interior points to, by the transit privilege under through rates, compete with the primary markets operating under proportional rates" (R. 749).

We respectfully, but nevertheless emphatically, wish to state that the Commission made no such finding and the record abundantly shows by the references hereinabove given that this is not correct, but that the primary markets are being seriously injured and damaged by the denial of transit on the lower rates on which grain dealers and millers operate at points on either side of them and all around them.

But it should require no evidence to support our contention in this respect. The situation speaks for itself. In a business so keen that a fraction of a cent determines who can make a sale, as the record shows and as the Commission has frequently stated in its decisions, how can a flour mill in Kansas City compete with another mill at Independence or a dozen other places when the mill in Kansas City has to pay 18 1/2c to ship grain or its products from Omaha to St. Louis for eastern destinations when the mill at Independence and a dozen others pay only 14c for the same service or 22 1/2 cents to Chicago when its competitors pay only 16 cents?

We repeat that this situation constitutes discrimination and prejudice against the primary markets on the face of it. That is so clear and palpable that it does not require the exercise of any expert or administrative action to determine it and under the circumstances the law will presume injury to those arbitrarily charged the higher rates.

The foregoing covers the main points of the opinion. It is evident therefrom that the court reached the wrong conclusion, because it overlooked or ignored the contention that, since there is no difference in the cost of service, a difference in rates and transit privileges is unlawful, and because it evidently did not understand that interior points can transit on the rate-break combinations and the through rates, while primary markets are confined to transit on the former. These points are fundamental in this case and the failure of the court to take them into consideration led it to erroneously sustain the Commission.

Commission Proceeded on Erroneous Legal Principles.

There is just one other point in the opinion of the lower court that we wish to mention. It says that "the Commission's conclusion that the result of the order is not unjust or unreasonably discriminatory is binding upon the court unless the Commission has proceeded upon er-

roneous legal principles or the order is so patently arbitrary that it may not be sustained on any rational theory" (R. 749-50).

In view of what we have said about the lower court's opinion, this statement hardly needs special attention. It is evident from the foregoing that the Commission "proceeded upon erroneous legal principles" when it required different transportation charges as between different points for exactly the same or similar transportation and transit services, a condition which no considerations can make lawful under the Interstate Commerce Act. The Commission has no right under the law to correct a situation which it deems improper in an unlawful manner—in violation of the express provisions of the Act and contrary to all of the criterions of fairness and justice.

These considerations make the Commission's order "so patently arbitrary that it may not be sustained on any rational theory." It has prescribed different transportation charges for the same or comparable services without finding any difference in the transit service or the cost thereof, but on the contrary, while finding that there is no difference in the transportation service; it has for certain incidental and relatively unimportant reasons reached conclusions contrary to those which it and the courts have always heretofore adhered to; and it has created discrimination which is clearly and palpably unjust and forbidden by the Act in a situation where there is no room for administrative or expert judgment.

SUMMARY AND CONCLUSION.

When what is superfluous in connection with this proceeding is put out of view, every substantial controversy which the case presents will be disposed of by determining whether the Commission has the power under the law to require one point on a through route to pay a higher rate in order to transit than another point on the

same or a comparable route. There is not a decision of the Commission or of a court but what has held that such a situation constitutes unjust discrimination and undue prejudice against the transit point paying the higher rates, and that is the rule that must be applied here regardless of the incidental and comparatively ephemeral considerations which induced the Commission to hold the contrary.

Since there is no difference in the service or the cost of the service, there are no conditions that could justify a difference in rates. Different charges for exactly the same or substantially similar transportation service are unlawful and it is our contention therefore that the orders of the Commission requiring the primary markets to pay higher rates in order to transit than interior points are absolutely void, and there can be no circumstances or conditions that can legally justify such action.

The fact that the primary markets have the rate-break, because of their geographical location and their competitive situation with respect to the lines of the railways, is not a lawful basis for a difference in treatment. Even if this were an advantage the Commission, nevertheless, has no authority to create a substantial discrimination to offset it, as it is the function of the Interstate Commerce Act to uproot every such discrimination.

The situation here is similar to that in the *Mitchell Case*, decided by this court April 28, 1941. There Chief Justice Hughes said, in an opinion in which all of the Justices concurred, that the legislative history of the Act indicates that the evil of discrimination was the principal thing aimed at and continued 85 L. Ed. (Adv.) l. c. 817:

> "On the facts here presented, there is no room, * * * for administrative or expert judgment with respect to practical difficulties. It is enough that the discrimination shown was palpably unjust and forbidden by the Act."

This is directly in point here because the discrimination complained of is palpably unjust and forbidden by the Act. In this case there is no room for the application of administrative theories or expert judgment and the practical difficulties which controlled the Commission cannot justify the discrimination clearly resulting from its action and expressly prohibited by the statute. Any other construction of the law would not only destroy the primary markets and leave them without a remedy, but would cause the provisions of the statute to accentuate and multiply the very wrongs which it was enacted to prevent.

We therefore respectfully request that this Honorable Court determine the principles of law in so far as they are applicable and relevant to the disposition of the matters herein complained of in accordance with the foregoing contentions and that judgment be rendered accordingly.

Respectfully submitted,

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